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February 27, 2025

CSXT-1

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

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

Dear Ms. Brown:

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

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for CSX Transportation, Inc.

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

CSX TRANSPORTATION, INC.'S
PETITION TO REJECT
NORFOLK SOUTHERN'S MINOR APPLICATION

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Dated: February 27, 2025

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Exhibits

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- Exhibit 2 Plaintiff CSX Transportation, Inc.'s Consolidated Opposition to Defendants' Motions for Summary Judgment, *CSX Transp. Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. May 3, 2021), ECF No. 328
- Exhibit 3 Tr. of Proceedings, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. Jan. 10, 2023), ECF No. 581
- Exhibit 4 Virginia Port Authority Comments, Nov. 7, 2023, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2)
- Exhibit 5 Letter from Virginia Port Authority's then-CEO and Executive Director, John F. Reinhart, to Norfolk & Portsmouth Belt Line Railroad Company's President and General Manager, Cannon Moss (Apr. 13, 2018)

Verified Statements

- Verified Statement of Ms. Maryclare Kenney, CSXT's Vice President of Intermodal and Automotive
- Verified Statement of Ms. Julie M. Carey, Senior Managing Director with National Economic Research Associates, Inc.
- Verified Statement of Dr. William Huneke, former STB Chief Economist and former Director of the STB's Office of Economics

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

CSX TRANSPORTATION, INC.’S
PETITION TO REJECT
NORFOLK SOUTHERN’S MINOR APPLICATION

1. INTRODUCTION AND SUMMARY

On February 14, 2025, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “NS”) filed a minor application seeking authority from the Surface Transportation Board (“STB” or “Board”) to control Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”). As explained below, CSX Transportation, Inc. (“CSXT”) asks the Board to reject the application because it is not timely¹ and because there are serious, extensive, and long-standing competitive issues that are inappropriate for a “minor” control proceeding.

NPBL was established in the late 19th century as an independent terminal railroad that provided all connecting railroads with equal access to facilities in the Norfolk, Virginia area. But for the last four decades, NS has improperly controlled

¹ The STB previously directed the parties “to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.” *Norfolk S. Ry. Co.—Pet. for Declaratory Order (NS Pet. for Declaratory Order)*, FD 36522, slip op. at 17 n.25 (STB served June 17, 2022). As discussed below, the district court’s decision remains under appellate review.

NPBL without the required STB authorization, allowing NS to transform NPBL from a neutral switching railroad into a tool wielded by NS to anticompetitive effect. Indeed, NS has perpetuated an anticompetitive scheme to manipulate and conspire with NPBL to exclude CSXT from on-dock rail access at Norfolk International Terminals (“NIT”), one of the most important port terminals on the Eastern Seaboard. In the last couple of decades, CSXT was only able to provide *de minimis* service to NIT via rail during one limited period of extraordinary circumstances and demand in 2015. Even then, NS and NPBL acted to keep that limited CSXT service from being timely and effective.

CSXT has developed extensive evidence in an antitrust lawsuit in the United States District Court for the Eastern District of Virginia (the “District Court”) of anticompetitive conduct by NS and NPBL – enabled by NS’s unlawful control of NPBL – and the anticompetitive effects of that conduct. (*See* Ex. 1, Complaint, *CSX Transp. Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. Oct. 4, 2018), ECF No. 1 [hereinafter Complaint].)² The District Court concluded that CSXT had presented evidence from which a jury could conclude that NS and NPBL engaged in unlawful, anticompetitive conduct harming competition at NIT. While the court determined that CSXT had waited too long to bring its lawsuit, CSXT has petitioned the Supreme Court of the United States to review that ruling, which petition remains pending.

In light of all this, the existence of serious competitive issues involving NS’s unauthorized control of NPBL cannot be credibly disputed. In addition, CSXT recently received a letter from the Department of Justice, Antitrust Division

² (*See also* Ex. 2, Plaintiff CSX Transportation, Inc.’s Consolidated Opposition to Defendants’ Motions for Summary Judgment, *CSX Transp. Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. May 3, 2021), ECF No. 328. [hereinafter CSXT’s Opposition to MSJ].)

(“USDOJ”) stating that it is conducting an investigation into the alleged exclusionary conduct undertaken by NS and NPBL against CSXT at NIT, in potential violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

CSXT strongly opposes NS’s attempt to obtain STB authority to control NPBL and CSXT intends to participate fully in any control proceeding opened by the Board. But the purpose of this Petition to Reject is not to address the merits of NS’s request. Instead, CSXT explains here why the Board must reject the NS minor application and classify any NS request for control authority related to NPBL as “significant” under the Board’s rules.

Pursuant to statute and the Board’s rules, the Board has 30 days to make an initial determination about whether to accept the NS application as complete or to reject the application as incomplete. *See* 49 U.S.C. § 11325(a); 49 C.F.R.

§ 1180.4(c)(7).³ The Board’s decision is informed by the contents of NS’s application and the Board’s determination as to whether the “transaction” proposed by NS is appropriately classified as “significant” or “minor.”

³ In practice, because of NS’s gamesmanship, the time for the Board to make this initial 30-day determination is much shorter – only 15 business days. The Board is directed by the statute to publish in the *Federal Register* any decision accepting the application “by the end of the 30th day after the application is filed.” 49 U.S.C. § 11325(a). The *Federal Register* requires that agency decisions be submitted by 2:00 p.m. three business days before they are published. 1 C.F.R. §§ 17.2(a)-(c). Therefore, the Board must finalize any decision that would accept the NS application by 2:00 p.m. on Tuesday, March 11, 2025, for *Federal Register* publication on Friday, March 14, in advance of the Sunday, March 16 end of the 30-day period. By deciding to file its application late on a Friday before a holiday weekend and on a date that results in a Sunday for the end of the initial 30-day period, NS has effectively given the Board 15 business days to complete its initial 30-day determination. While the Board’s rules at 49 C.F.R. § 1104.13(a) allow CSXT to respond to NS’s application by March 6, 2025, CSXT has expedited its review of NS’s application and is submitting this response well in advance of that deadline, in order to give the Board as much time as possible to consider these important issues.

In most control applications, the applicant proposes a transaction to acquire another railroad, and the Board first seeks to understand the competitive effects and potential public benefits of the proposed changed circumstances in order to make the initial “minor” or “significant” classification. In this case, NS has not proposed an actual transaction for the Board to consider. Instead, NS simply seeks to obtain the Board’s rubber stamp for the control authority that NS should have sought more than 40 years ago, when the relevant transaction actually occurred. In doing so, NS asks the Board to ignore the effects of its unlawful control.

Indeed, NS encourages the Board to avoid any traditional competitive analysis whatsoever, stating essentially that the Board won’t find any anticompetitive effects or public benefits relating to its approval of NS’s application since the approval will not result in any changes – the currently unlawful control would simply continue with the Board’s stamp of approval. (*See* Appl. 18-19.) In NS’s view, apparently the only practical result of the Board’s approval will be “NS having antitrust immunity for any actions related to its control of NPBL.” (*Id.* at 37.)

But the Board cannot just process NS’s application with blinders on. The Board must consider the competitive effects of NS’s proposal by looking at two different scenarios: (1) NPBL operating as an independent, neutral railroad (without NS control), and (2) NPBL operating as an alter-ego of NS (with NS control). After all, denial of the requested control authority would require that NS divest control and that NPBL operate as a neutral railroad, as it was originally conceived and operated for decades. The Board must consider the competitive effects of the request for control authority by looking at the competitive effects with and without the requested authority.

Once the Board applies this proper framework, it is impossible for the Board to determine – at the outset based on NS’s application – that no competitive effects

will occur if the Board approves NS's application. A "minor" classification would completely disregard the Board's own regulations and precedent. First, NS has not come anywhere near providing the Board with the economic evidence that the Board would need in order to make a "minor" classification. Second, a "minor" classification would overlook the extensive evidence already developed in other proceedings on the anticompetitive impacts of NS's control of NPBL. In light of these circumstances, NS's assertion that the lack of competitive effects of its proposal is clear at the outset – that there are no competitive issues for the STB to examine – goes far beyond mere posturing and hubris. Put simply, it is irresponsible to make such a claim.

In addition to the stark competitive issues that require rejection of NS's application, it also must be rejected because it is untimely and contrary to this agency's previous directive. When the Board found, in response to a request from the District Court in CSXT's antitrust lawsuit, that NS never obtained the necessary authority to control NPBL, the Board directed the parties to address NS's unauthorized control *after* the completion of the lawsuit. The Board had a valid rationale for directing the parties to wait to come back to the Board until the end of the District Court proceeding, *including any appeals*. As the Board stated, "any future decision concerning control would benefit from the findings of the District Court." *NS Pet. for Declaratory Order*, FD 36522, slip op. at 17. Rather than wait as the Board directed, NS decided to file its control application while the suit is still pending on petition to the Supreme Court. NS's motive in ignoring the STB's directive is obvious. NS claims in its application that granting NS its requested control authority would "result in NS having antitrust immunity for any actions related to its control of NPBL." (Appl. 37.) NS is trying to use the STB to achieve its anticompetitive goals by seeking antitrust immunity as soon as possible.

On the question of timing, the Board should be aware that after the completion of CSXT's lawsuit, CSXT intends to address NS's on-going unauthorized control by asking the Board to order NS to divest its control of NPBL and restore NPBL to its intended purpose as a neutral, independent terminal railroad. CSXT intends to ask the Board to impose other remedies to address NS's unauthorized control of NPBL, including:

- granting direct CSXT terminal trackage rights to NIT;
- awarding CSXT damages and imposing civil penalties⁴ on NS resulting from NS's violation of the statutory requirement to obtain STB authority before controlling NPBL;
- ordering NS to restore an active line of railroad allowing for efficient access to NIT that NS unlawfully removed without obtaining the required abandonment authority; and
- dismissing NS's sham trackage rights fee proceeding.

CSXT will establish that the strong likelihood of anticompetitive effects and the lack of any countervailing public benefits will ultimately warrant denial of any complete and timely significant application that NS later files. But first, CSXT requests through this Petition to Reject that the Board issue a decision within the initial 30-day window that: (1) classifies NS's proposal as "significant," (2) rejects the NS minor application as untimely and incomplete, and (3) directs NS not to file a significant application seeking control authority regarding NPBL until after resolution of CSXT's District Court proceeding, including any appeals. The Board

⁴ *NS Pet. for Declaratory Order*, FD 36522, slip op. at 17 n.24 ("The Board expects stakeholders to bring such matters before the Board expeditiously and reminds the parties that a knowing violation of the Board's requirements can result in the imposition of civil penalties, and that, for certain violations, such penalties may be imposed for each day that the violation continues. *See* 49 U.S.C. § 11901(a).").

would benefit from the District Court's findings about NS's and NPBL's anticompetitive actions.

CSXT's Petition to Reject is supported by verified statements from Maryclare Kenney, Vice President of Intermodal and Automotive at CSXT; Julie M. Carey, Senior Managing Director with National Economic Research Associates, Inc.; and Dr. William Huneke, former STB Chief Economist and former Director of the STB's Office of Economics.

2. BACKGROUND

2.1. NPBL was established for the mutual benefit of all its owners, but is now controlled by NS.

NPBL was incorporated as the Southeastern and Atlantic Railroad Company in 1896. It was formed by eight railroads: Norfolk & Western; Chesapeake & Ohio; Southern; New York, Philadelphia & Norfolk; Atlantic & Danville; Atlantic Coast Line; Norfolk & Southern; and Seaboard Air Line. In 1898, the corporate name changed to Norfolk and Portsmouth Belt Line Railroad Company ("NPBL"), and NPBL commenced operations.⁵ NPBL was established as a belt line railroad "for the mutual benefit of each" owner and in which "all [owners] are to be equally interested." (Ex. 1, Complaint, Ex. A, Agreement 3 of 9.) Additionally, NPBL was to provide an efficient means of interchanging the traffic of its owners between their line and various marine terminals and industries located on NPBL's tracks.

Through a series of mergers and acquisitions, NPBL became currently owned by NS (57%) and CSXT (43%) with a board of directors consisting of six voting members and one non-voting member. (*Id.* at Ex. D, By-Laws of NPBL 1.) By virtue of its mergers and consolidation, NS has designated, voted for, and now controls four members of the NPBL board. CSXT can designate only two members for

⁵ (See VPA Mot. to Dismiss 2, June 21, 2011, *Va. Port Auth.—Acquisition Exemption—Norfolk & Portsmouth Belt Line R.R. Co.*, FD 35532.)

election to the NPBL board. NS has appointed current and former NS employees as NPBL directors and as the current NPBL president. NS has rebuffed CSXT's proposals to install an independent board and independent management. This allows NS to control the NPBL board and the management and operation of the railroad as necessary to further NS's self-interest. CSXT's Vice President of Intermodal and Automotive, Maryclare Kenney, explains in the attached verified statement that NS continues today to misuse its unauthorized control of NPBL to prevent NPBL from acting as an independent terminal railroad, serving the interests of its owners. As discussed further below, NS never obtained the necessary STB authority to acquire control of NPBL.

2.2. NPBL has trackage rights over NS lines to provide switching services that would allow CSXT to access NIT.

In 1917, NPBL was granted trackage rights by the Virginian Railway, an NS predecessor and co-owner of the NPBL at the time. This resulted in NPBL extending the scope of its operations to reach the area in Norfolk, VA that is now occupied by NIT. (Ex. 1, Complaint, Ex. B, Map.)

NIT has become one of the most important intermodal terminals serving ocean vessels on the East Coast. NIT is owned and operated by the Virginia Port Authority ("VPA"), a political subdivision of Virginia. In fiscal year 2024, approximately 1.9 million containers (3.5 million twenty-foot equivalent units) moved through the Port of Virginia's ("POV") terminal properties.⁶ Additionally, POV is implementing a \$1.4 billion Capital Gateway Program to expand its capacity. For example, in 2024, POV completed its \$83 million Central Rail Yard

⁶ POV, Annual Comprehensive Financial Report for the Fiscal Year ended June 30, 2024 at 17 (2024), <https://www.portofvirginia.com/wp-content/uploads/2024/09/Virginia-Port-Authority-06-30-2024-Annual-Comprehensive-Financial-Report-as-Issued.pdf>.

expansion at NIT, which will open for business in 2025 and will provide additional capacity at NIT.⁷

NS's rail lines reach NIT directly. NS's main line serving the Norfolk area enters from the west at NS's Portlock Yard, located between the South and North branches of the Elizabeth River. From the Portlock Yard, NS has a rail line that continues north across the North Branch of the Elizabeth River, eventually reaching NIT. NPBL has trackage rights over NS's Norfolk lines from a point just outside of NPBL's Berkley Yard (NS Junction) to a point just outside of NIT (West Junction).

CSXT does not have a direct rail line into the Norfolk marine terminal area that includes NIT. But consistent with the purpose of the NPBL, CSXT, the joint owner of NPBL, should be able to use NPBL's switching service to reach shippers at NIT. CSXT would do so were it not for NS's unlawful control of NPBL.

In addition to NIT, NPBL also accesses and serves various carload customers and interchanges with other shortline railroads in the Norfolk and Portsmouth area. In its application, NS failed to even identify those NPBL customers, let alone provide any analysis of the potential competitive effects of NS's control of NPBL on those stakeholders.

2.3. NS's anticompetitive conduct has been the subject of multiple Board and court proceedings.

On September 13, 2018, NS petitioned the STB to set compensation for the trackage rights of NPBL over NS's rail lines, and to allow an increase in the trackage rights fee above the historic rate. (NS Pet. to Set Trackage Rights Compensation, Sept. 13, 2018, *Norfolk S. Ry. Co.—Petition to Set Trackage Rights Compensation—Norfolk & Portsmouth Belt Line R.R. Co. (NS Trackage Rights*

⁷ See, e.g., POV, Norfolk International Terminals (NIT) (2024), <https://www.portofvirginia.com/wp-content/uploads/2024/03/2024-NIT-1-Page.pdf>.

Compensation), FD 36223.) Interestingly, NS filed its petition soon after CSXT put NS and NPBL on notice of potential litigation over their anticompetitive conduct.

Out of concern that NS would use the trackage rights proceeding to further NS's anticompetitive conduct and objectives, CSXT intervened in the STB proceeding and submitted to the STB a copy of the complaint in the federal District Court litigation after it was filed on October 4, 2018. (Pet. for Leave to Intervene of CSXT, Oct. 3, 2018, *NS Trackage Rights Compensation*, FD 36223; CSXT Letter, Oct. 5, 2018, *NS Trackage Rights Compensation*, FD 36223.) On April 18, 2019, CSXT filed a petition with the STB to request the proceeding be held in abeyance until resolution of the District Court litigation. (CSXT's Pet. for Clarification or, if Necessary, Reconsideration, and Request to Hold Proceeding in Abeyance, Apr. 18, 2019, *NS Trackage Rights Compensation*, FD 36223.) On July 24, 2019, the STB ordered that the trackage rights proceeding be held in abeyance until resolution of CSXT's District Court proceeding. *NS Trackage Rights Compensation*, FD 36223 (STB served July 25, 2019).

On October 4, 2018, CSXT sued NS, NPBL, and members of NPBL's board of directors in the District Court. CSXT alleged that NS and NPBL engaged in anticompetitive conduct, summarized further below, including the setting of a switching rate intended to preclude CSXT from competing at NIT. The District Court concluded that CSXT had presented substantial antitrust claims based on the record developed and presented at summary judgment, but the Court dismissed CSXT's complaint on statute of limitations grounds and lack of ability to grant injunctive relief.

In dismissing the injunctive claims, the District Court expressly noted that CSXT's claims of anticompetitive conduct could be subject to investigation by the USDOJ – which, as discussed above, has opened an antitrust investigation into NS's and NPBL's conduct. The Court also noted that, to the extent that CSXT's

concerns involve NS's unauthorized control over NPBL, they could "be subject to federal oversight and certain injunctive remedies as imposed by the STB." *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530, 2023 U.S. Dist. LEXIS 47633, at *29 n.13 (E.D. Va. Jan. 27, 2023).⁸

In the lawsuit, NS argued that it was immunized from CSXT's claims of anticompetitive conduct by authority previously granted to NS's predecessors to control NPBL. In response to that defense, the District Court referred the issue to the STB. In 2022, the STB flatly rejected NS's claim, finding that NS and its parent company had never obtained the necessary STB authority to control NPBL. *NS Pet. for Declaratory Order*, FD 36522, slip op. at 17. The STB further stated that it "expects 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.

3. ARGUMENT

3.1. A control transaction is "significant" unless it is clear at the outset that there will be no anticompetitive effects or that any anticompetitive effects will be outweighed by public benefits.

When a transaction does not involve the merger or control of two or more Class I railroads, the Board's treatment of the transaction differs based on whether the transaction would have "regional or national transportation significance." 49 U.S.C. § 11325. Under the Board's regulations at 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as a "minor" transaction—and thus a transaction that does not have regional or national

⁸ See also Recording of Oral Argument at 28:31-29:00, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 23-1537 (4th Cir. Mar. 21, 2024), available at <https://www.ca4.uscourts.gov/OAarchive/mp3/23-1537-20240321.mp3>.

transportation significance—if a determination can be made at the outset that either:

- (1) the transaction *clearly* will not have any anticompetitive effects; or
- (2) any anticompetitive effects of the transaction will *clearly* be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs.

49 C.F.R. § 1180.2(b) (emphasis added). If neither of these determinations can be made at the outset, the Board must classify a transaction not involving the control or merger of two or more Class I railroads as “significant.” *Id.*⁹

The Board has stated that “[t]he purpose of the test articulated in § 1180.2 is to allow the Board to lessen the regulatory burden when ‘a determination can *clearly* be made, at the time the application is filed, that the transaction passes muster under’ the statute.” *CSX Corp.—Control & Merger—Pan Am Systems, Inc. (CSX/Pan Am)*, FD 36472, slip op. at 9 (STB served Mar. 25, 2021), citing *R.R. Consolidation Procedures: Definition of, & Requirements Applicable to, “Significant Transactions,”* 9 I.C.C.2d 1198, 1200 (1993) (emphasis in original). The Board “considers each proposed transaction based on its unique factual circumstances and [its] regulatory criteria for classifying transactions.” *CP/DM&E*, FD 35081, slip op. at 7.

A transaction classified as “significant” must meet different procedural and informational requirements than a transaction classified as “minor.” For example,

⁹ See *Canadian Nat’l Ry. Co.—Control—Iowa N. Ry. Co. (CN/IANR)*, FD 36744, slip op. at 2-3 (STB served Mar. 29, 2024). See also *Canadian Pac. Ry. Co.—Control—Dakota, Minnesota & E. R.R. Corp. (CP/DM&E)*, FD 35081, slip op. at 5 (STB served Nov. 2, 2007) (“[A] transaction is to be classified as ‘significant’ unless the application shows on its face (1) that the transaction clearly would not have any anticompetitive effects, or (2) that any anticompetitive effects would clearly be outweighed by the anticipated contribution to the public interest in meeting ‘significant’ transportation needs.”).

in a “significant” transaction, the applicants must submit more detailed information regarding competitive effects, operating plans, and other issues. 49 C.F.R.

§§ 1180.6(c); 1180.7(a), (c); 1180.8(b). Responsive applications are permitted for a “significant” transaction but are not permitted for a “minor” transaction. *See* 49 C.F.R. § 1180.4(d)(1). Additionally, the time limit for Board review is longer for a “significant” transaction than for a “minor” transaction. 49 U.S.C. § 11325(d); 49 C.F.R. § 1180.4(e).

Applicants in control or merger proceedings regularly assert that a proposed transaction should be classified as a “minor” transaction. The Board has a duty to carefully review the information presented in the application and in the record and to apply its regulatory criteria for classifying transactions. In at least two such proceedings, the Board has determined that, despite the applicants’ contentions, the proposed transaction was a “significant” transaction, rather than a “minor” transaction.

In *CP/DM&E*, the applicants asserted in their initial application that the proposed transaction satisfied the criteria for a minor transaction. (Canadian Pac. et al. Appl. 5, Oct. 5, 2007, *CP/DM&E*, FD 35081.) However, the Board issued a decision finding that the transaction would be a significant transaction. *CP/DM&E*, FD 35081, slip op. at 7. The Board stated that, although the applicants’ submission stated that no currently served shipper would become captive as a result of the transaction, the submission did not “clearly establish that there would be no other anticompetitive effects that might result from the transaction.” *Id.*, slip op. at 6-7.¹⁰

¹⁰ The Board specifically noted that the applicants’ submission did not “contain information that rules out the possibility that there are some shippers whose competitive options would be reduced post-transaction[,]” nor did the submission “provide details regarding those stations that both Applicants could serve but at which only one Applicant derived revenue from originating or terminating traffic in 2005.” *CP/DM&E*, FD 35081, slip op. at 7.

The Board further stated that the applicants' submission asserted there were anticipated benefits associated with the transaction. *Id.*, slip op. at 7. However, the Board concluded, "[b]ased on the information we have about the possible competitive impacts today, we are unable to conclude at this stage that such impacts would clearly be outweighed by the potential benefits." *Id.*

Similarly, in *CSX/Pan Am*, the applicants asserted in their initial application that the proposed transaction was a minor transaction. (CSXT et al. Appl. 9, Feb. 25, 2021, *CSX/Pan Am*, FD 36472.) However, the Board issued a decision finding that the proposed transaction would be a significant transaction. *CSX/Pan Am*, FD 36472, slip op. at 11. The Board stated that, based on the current record, it could not "make the determination that the transaction clearly would not have any anticompetitive effects." *Id.*, slip op. at 10.

The Board expressed that the competitive impact of the proposed transaction was "not clear at this time, notwithstanding the remedial measures that Applicants have proposed[,] and "the record currently before the Board does not *clearly* establish that the transaction would not have any anticompetitive effects." *Id.* (emphasis in original). The Board further stated that:

classifying this transaction as "significant" would provide the Board with the additional information and time needed to develop a more comprehensive record so that the Board may analyze the competitive concerns identified here (and any others not apparent from the [applicants' submission]) and consider whether Applicants' proposed remedies, including the conditions that Applicants have requested the Board impose, adequately address these concerns.

Id.

Additionally, the Board noted that the applicants' submission asserted that there were anticipated benefits associated with the proposed transaction. *Id.*, slip op. at 11. However, the Board concluded that, "[b]ased on the information the Board has about the possible competitive impacts today, the Board is unable to conclude at

this stage that any anticompetitive impacts would clearly be outweighed by the potential contribution to the public interest in meeting significant transportation needs.” *Id.*

Unlike the transactions described above, in a true minor transaction, the Board *is* able to make a determination, on the face of the application, that the transaction clearly will not have any anticompetitive effects, or any anticompetitive effects of the transaction will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs.

Here, NS does not even allege the existence of any public interest benefits related to its proposal. And as described above, the existence of serious competitive effects involving NS’s unauthorized control of NPBL cannot be credibly disputed. As a result, treatment as a minor transaction is both wholly inappropriate and contrary to Board precedent. *See, e.g., Soo Line Corp.—Control—Cent. Maine & Quebec Ry. US Inc.*, FD 36368 (STB served Jan. 16, 2020) (“[I]f anticompetitive effects resulting from the Transaction should later be shown to be likely, they would appear, from the face of the application, to be clearly outweighed by the Transaction’s contribution to the public interest in meeting significant transportation needs.”); *CN/IANR*, FD 36744, slip op. at 6 (STB served Feb. 29, 2024) (finding the transaction to be “minor” “because it appears from the face of the Application that the efficiency and other public interest benefits would clearly outweigh whatever anticompetitive effects may exist.”).

3.2. The NS proposal is “significant” because the STB cannot determine from NS’s application that the NS proposal “clearly will not have any anticompetitive effects.”

NS has filed a minor application seeking Board authority to control NPBL. But NS has not actually proposed entering into a new transaction. (*See* Appl. 41) (“There is no new transaction.”) Instead, NS argues that it has in fact controlled

NPBL for the last four decades, and now seeks Board authority to “legally effectuate a corporate and shareholder structure that has been in place since 1982.” (*Id.* at 7.) NS claims that its proposal is “clearly a minor transaction” because it “clearly will not have any anticompetitive effects.” (*Id.*) NS is so confident of its position that it did not even bother to put in the record any substantial data or evidence on the relevant markets and competitive effects, other than anecdotal statements and vague descriptions. And NS failed to assert any public benefits related to its proposal. (V.S. Carey 7-8.) Because NS’s application prevents the Board from conducting any real analysis of the minor v. significant issue, the Board must find that the NS proposal is “significant.”

The crux of NS’s argument is that the Board now granting NS authority to control NPBL will not result in anticompetitive effects because NS has already unlawfully controlled NPBL for 42 years. Under NS’s reasoning, there is no need to conduct any traditional competitive analysis of its control of NPBL because NS has exercised that control for four decades and the Board’s approval of that control “will not change the manner in which NPBL operates today.” (Appl. 8.) If nothing is changing, in NS’s view, no anticompetitive effects could flow from the Board’s approval.

Under NS’s perverse and cynical theory, if NS has already destroyed competition, no further anticompetitive effects can flow from the Board’s formal ratification of NS’s control of NPBL. Of course, if the Board now grants NS a license to continue to exclude CSXT from the NIT on-dock rail market, the anticompetitive effects that resulted from NS’s unlawful exercise of control of NPBL would simply be perpetuated indefinitely. Indeed, as Dr. Huneke explains: “if the STB rules that this is a minor transaction, given all of the history of competitive concerns associated with it, it begs the question: Will there ever be another significant transaction case if this precedent is set?” (V.S. Huneke 3.)

In order to properly assess NS's proposal, the Board must consider the competitive effects of a scenario where NPBL operates as an alter-ego of NS (with NS control) as compared to a scenario where NPBL operates as an independent, neutral railroad (without NS control). As explained in this Section 3.2, for some time, NS has used its unauthorized control of NPBL to successfully eliminate any competition with CSXT for rail access to NIT that otherwise could have existed. And NS has pledged in its application to continue its conduct should the Board ultimately grant NS's application. (*See* Appl. 8, 15.)

3.2.1. NS has exercised its unlawful control of NPBL to prevent CSXT from competing effectively with NS for intermodal traffic movements at NIT.

In this Section 3.2.1, CSXT explains that, while NPBL was created and is supposed to operate today for the purpose of providing its owners with access to the facilities served by the belt line, NS has exercised its unlawful control of NPBL to manipulate the policies and practices of NPBL to advance NS's anticompetitive interests and to prevent CSXT from becoming an effective competitor for intermodal traffic at NIT. In Section 3.2.2 below, CSXT also explains that this unlawful conduct has had serious anticompetitive effects. CSXT presents this evidence not to address the ultimate merits of NS's proposal, but to show the Board that it is far from clear at the outset that there will be no anticompetitive effects that flow from the Board's approval of NS's application.

As noted above, on October 4, 2018, CSXT sued NS, NPBL, and members of NPBL's board of directors in the District Court, alleging that NS's and NPBL's exclusionary conduct, including but not limited to the setting of a switching rate intended to preclude CSXT from competing at NIT and refusing to consider service alternatives that would permit competitive access, constituted antitrust violations.

Contrary to NS's characterization of the District Court's findings in NS's application, the District Court concluded that CSXT "has identified sufficient direct and circumstantial evidence of an agreement between [NS] and NPBL in and around 2009 that was aimed (and may have unlawfully succeeded) at erecting barriers to [CSXT's] ability to provide on-dock rail service at NIT." *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679, 727 (E.D. Va. 2023), *aff'd*, 114 F.4th 280 (4th Cir. 2024). Although the District Court determined that CSXT had developed a sufficient evidentiary record on the existence of anticompetitive conduct and anticompetitive effects to warrant a trial, the District Court dismissed CSXT's complaint on statute of limitations grounds and lack of ability to grant injunctive relief.¹¹ The evidence presented in the District Court case of exclusionary conduct by NS and NPBL was extensive and includes but is not limited to the following:

- NS's efforts to exclude CSXT from effective access to NIT began as early as 2008 when NS and NPBL sought and obtained STB authority, by invoking a class exemption from otherwise applicable STB approval requirements, to discontinue rail service and trackage rights over a line segment between NS Junction at MP 1.40 and Carolina Junction MP 2.30 (the "Connecting Line").¹² (*See* Ex. 1, Complaint ¶58.)
 - o The 0.90-mile line segment allowed efficient movement of traffic between NPBL's Berkeley Yard and the tracks leading to NIT without having to enter NS's congested Portlock Yard.
 - o Subsequently, without seeking authority to abandon the line or advising the Board of its plans, NS unlawfully removed the tracks.

¹¹ The U.S. Court of Appeals for the Fourth Circuit affirmed the District Court decision, and CSXT has appealed that Fourth Circuit decision to the U.S. Supreme Court. That appeal is pending, and the Supreme Court requested that NS reply to CSXT's petition for certiorari by February 13, 2025. NS obtained an extension of that deadline, and now must reply by March 17, 2025.

¹² *See Norfolk S. Ry. Co.—Discontinuance of Service Exemption—in Chesapeake, VA*, AB 290 (Sub-No. 299X) (STB served May 15, 2008); *Norfolk & Portsmouth Belt Line R.R. Co.—Discontinuance of Trackage Rights Exemption—in Chesapeake, VA*, AB 1024X (STB served May 15, 2008).

- Next, in 2009, NPBL rejected a CSXT proposal for a volume-based intermodal-specific switch rate to NIT, even though the CSXT proposal would have generated significant additional revenue for NPBL.
 - o NPBL ultimately adopted a counter proposal from NS that provided for a new tariff that removed various tiers of rates and instead provided a “uniform rate” for all commodities. (*See* Ex. 2, CSXT’s Opposition to MSJ ¶¶ 22, 29.) NS, using its control over NPBL, induced NPBL to reject CSXT’s proposal and manipulated NPBL into adopting the \$210/car uniform switching rate for all traffic, including intermodal traffic from NIT.¹³ Thus, instead of changing the existing rate (which was already too high to move intermodal traffic) NS/NPBL *increased* that rate by subjecting all intermodal traffic to a much higher universal switch rate. (*See* Ex. 1, Complaint ¶ 34.)
- In 2015, CSXT attempted to utilize NPBL to move intermodal traffic to meet the extraordinary demand for intermodal service from international shippers seeking to use East Coast facilities. But NS used its control over the line and NPBL to impede the movement of CSXT’s traffic. (*See id.* at ¶ 55.) Given the obstacles thrown up by NS for NPBL’s artificially high switch service via NPBL’s trackage rights over NS, CSXT could not effectively service NIT via rail due to the delays in operating windows and ultimately could move, at most, a few trains during this period.
 - o Since 2015, CSXT has been unable to move any intermodal traffic by rail to or from NIT due to the successful efforts of NS to stifle competition by foreclosing CSXT’s access to NIT via NPBL’s cost-prohibitive switching rate and undependable service to NIT.
- In 2016, NS sought to replace the 1917 trackage rights agreement with NPBL with a new agreement charging higher trackage rights fees.¹⁴ This would enable NS to argue that NPBL’s rates could not be reduced and may need to be raised, which NS has in fact done.

¹³ This rate was orders of magnitude higher than the switch rate charged by an independent terminal railroad (the Commonwealth Railway) for comparable movements from the other major intermodal terminal in Norfolk, the Virginia International Gateway (“VIG”) terminal. (*See* Ex. 1, Complaint ¶ 34; *id.* at Ex. E 11 of 15.)

¹⁴ Under long-standing STB precedent, the terms of that 1917 trackage rights agreement will remain in place until the STB authorizes NPBL to enter into a new agreement with NS, or until the STB sets those terms through this or a similar proceeding. *See, e.g., N. Carolina R.R. Co.—Pet. to Set Trackage Rights*

- In 2018, CSXT asked the NPBL to (1) change its governance and management to be independent of NS and (2) adopt switching rate changes that would enable CSXT to compete with NS for intermodal traffic to and from NIT while guaranteeing revenue to NPBL.¹⁵ (*Id.* at Ex. E.) NS once again voted down the governance and management changes through its majority control, and NPBL did not adopt CSXT's rate and service proposal. (*See* Ex. 1, Complaint ¶40.)

3.2.2. NS's and NPBL's actions to foreclose CSXT's access to on-dock rail at NIT have had serious anticompetitive effects.

Not only is there extensive evidence of anticompetitive conduct leading to CSXT's exclusion from the important NIT facility, CSXT put forth abundant evidence in the District Court litigation of the adverse competitive effects of the unlawful conduct. And the court concluded that CSXT's evidence of anticompetitive effects was sufficiently weighty to merit a jury trial.

NS asserts that on-rail access at NIT could not be considered a relevant antitrust market due to the purported availability of service at VIG, use of drayage at NIT, and ability to redirect shippers to use other East Coast ports. As a result, NS alleges that it does not have market power and that there is "clearly" no potential for a finding of anticompetitive effects from its conduct. Yet, Judge Mark Davis of the District Court, after reviewing the evidence, concluded otherwise. In denying NS's motion for summary judgment on CSXT's injunctive relief claims, Judge Davis addressed each of these issues and found that genuine issues of material fact existed to support the antitrust claim, including as to relevant market definition and NS's market dominance. *See CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d at 679, 725-27.

Compensation & Other Terms & Conditions—Norfolk S. Ry. Co., FD 33134, slip op. at 3 (STB served May 29, 1997).

¹⁵ CSXT's proposal included free use of CSXT locomotives and free fuel for use by NPBL.

Indeed, Judge Davis specifically held that fact issues existed “concerning the degree to which drayage is a suitable alternative to on-dock rail based on capacity limitations and/or international shippers’ desire to avoid relying on drayage” and that “one reasonable interpretation of the summary judgment record is that VIG is not a true ‘alternative’ to NIT.” *Id.* at 726 (emphasis omitted). In short, Judge Davis soundly rejected NS’s claims that it was entitled to judgment as a matter of law on competition questions raised by its conduct. But NS now boldly asserts to this Board that there are “clearly” no competition questions. The two cannot be reconciled.

Judge Davis went further, stating that CSXT’s evidence of anticompetitive conduct occurring in 2015 and 2018, “as well as the CSX-favorable inferences that can be drawn therefrom, when considered in the context of the past conduct, present a triable issue as to whether [NS] will use its ability to control the NPBL Board to harm CSX in the future in the same way it allegedly did so in the past.” *Id.* at 723.

In addition, in anticipation of trial, NS and NPBL had each filed a motion *in limine* to exclude expert testimony of CSXT’s economic expert, who argued that NS’s and NPBL’s actions to foreclose CSXT’s access to on-dock rail at NIT created an adverse impact and harmed competition. NS and NPBL argued that CSXT’s expert testimony was inadequate. Magistrate Judge Robert J. Krask flatly rejected that claim and found there were numerous issues relating to competitive effects that would need to be examined at trial. (Ex. 3, Tr. of Proceedings at 14:2-9; 22:24-23:1; 24:1-3; 25:24-26:4; 28:16:21; 29:5-10; 32:10-12; 37:14:17, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. Jan. 10, 2023), ECF No. 581.)

A few straightforward examples from the Magistrate Judge’s treatment of the parties’ *in limine* motions show that serious disputes existed over the impact of NS’s and NPBL’s exclusionary conduct, and the same issues are raised by NS’s current application for control authority.

- First, a key point in NS's application is that CSXT can compete for POV traffic through its on-dock rail access to NIT via the NPBL. (*See* Appl. 32.) In the district court litigation, CSXT vigorously contested this claim, and argued that CSXT had been foreclosed from access to NIT, which restricted CSXT's ability to compete for intermodal business. CSXT's expert presented an economic analysis of the impact of that foreclosure. The Magistrate Judge concluded that "[CSXT] had carried its burden to establish that this aspect of [CSXT's economist]'s testimony is reliable." (Ex. 3, Tr. at 22:20-23.)
- Second, NS baldly claims in its application that shippers will suffer "zero competitive harm" if the application is approved (Appl. 14). In the antitrust litigation, CSXT presented extensive evidence that CSX's lack of access to NIT resulted in higher prices to ocean carriers who relied on NIT. (Ex. 3, Tr. at 14:17-22.) The Magistrate Judge found that evidence "arguably supports" CSXT's argument that "the increased pricing he observed primarily resulted from anti-competitive conduct." (*Id.* at 20:19-21.).
- Third, NS claims in the application that the NPBL switch rate is not exclusionary. NPBL made the same claim in the antitrust case. Both sides submitted extensive evidence on the reasonableness question and the Magistrate Judge found that the switch rate analyses were issues that would need to be examined at trial.
- Fourth, NS asserts in the application that "Drayage is an effective competitive alternative to on-dock rail access." (Appl. 33-35.) NS made the same claim in the antitrust litigation and CSXT submitted extensive evidence that drayage is not an adequate substitute for on-dock rail access at NIT. The Magistrate Judge concluded that it was an issue for trial. (Ex. 3, Tr. at 37:14-17; 39:4-5.)

As noted previously, the District Court eventually dismissed CSXT's injunction claims on grounds that it did not have jurisdiction over those claims, noting that other agencies, including the USDOJ and the STB, are better situated to address those concerns. As a result, a trial on these competitive impact issues has not yet occurred. However, it goes beyond incredible for NS to claim that the court concluded there were no serious competitive issues raised by CSXT's years of antitrust litigation. NS cannot re-write the factual record to its own advantage with

the hope the Board will turn a blind eye to the key disputed issues that NS now has brought back to the forefront by its pending application for control authority.

3.2.3. The NS trackage rights compensation proceeding is a sham intended to perpetuate NS's anticompetitive scheme.

NS talks at length in its application about its pending petition for the Board to reset the compensation that NPBL pays NS for trackage rights leading into NIT at a higher level than NPBL paid historically, using the Board's *SSW Compensation* methodology. As NS notes in its application, this trackage rights fee is a necessary component of NPBL's costs for providing switching services to NIT. NS attempts to assuage any concerns about its control of NPBL and the higher fee levels that the Board could set, stating that "[NS] will not establish a market-based trackage rights fee for NPBL, but instead will agree to have the Board set an SSW trackage rights rate." (Appl. 15.) NS claims that this commitment "will ensure that NS cannot exercise its control over NPBL to affect an anticompetitive trackage rights fee." (*Id.*)

Contrary to NS's claims, it has become clear since the Board held the trackage rights compensation proceeding in abeyance that NS initiated and has used the very existence of the proceeding to further its anticompetitive scheme to prevent CSXT from competing with NS for intermodal traffic at NIT. Once the Board removes the proceeding from abeyance, when litigation over CSXT's antitrust claims is over, CSXT intends to ask the Board to dismiss the proceeding and allow the historic trackage rights fee to remain in place.

The proceeding itself is a sham. NS and NPBL have both admitted that NS controls NPBL. Through this control relationship, NS and NPBL have manufactured a "disagreement" over trackage rights fees to use the STB to advance their long-standing anticompetitive scheme to exclude CSXT from access to NIT and to immunize their anticompetitive conduct. In fact, any disagreement between NS and NPBL would be like a ventriloquist arguing with its puppet.

Through its fee request, NS plainly intends to cement its exclusion of CSXT from access to NIT by increasing the cost that NPBL must pay to use NS's tracks that lead into NIT. An increase in the NS trackage rights fee would be one more link in the chain of anticompetitive conduct that keeps CSXT out of the market.

Not only is NS seeking to use the STB to cement the exclusion of CSXT from access to NIT by setting higher trackage rights fees, NS is also using the mere pendency of the fee-setting proceeding to prevent NPBL from even considering new CSXT commercial proposals for access to NIT. On November 26, 2024, CSXT (yet again) made a proposal to the NPBL board regarding rates and contractual terms for NPBL to provide switching services to CSXT for movement of intermodal traffic to and from NIT. In addition to free use of CSXT locomotives and free fuel, CSXT offered to pay NPBL's crew costs. (V.S. Kenney, Attach. A., Letter from CSXT (Nov. 26, 2024).)

On December 4, 2024, NS responded to CSXT's proposal, claiming that { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } (*Id.*, Attach. A, Letter from NS 2 (Dec. 4, 2024).)¹⁶

The fee-setting proceeding itself is evidence of the anticompetitive NS conduct enabled by NS's unauthorized control of NPBL. Allowing NS to now lawfully obtain control of NPBL would allow this anticompetitive conduct to

¹⁶ Ironically, NS also suggested that { [REDACTED] [REDACTED] } (V.S. Kenney, Attach. A., Letter from NS 2 (Dec. 4, 2024).) Of course, while CSXT's minority representation on the NPBL board cannot cause the NPBL board to accept the NS trackage fee proposal, NS could certainly do so with its majority representation. NS's suggestion lays bare the sham perpetrated on the STB.

continue and would be plainly inconsistent with the legal standard for classification of a minor transaction.

3.2.4. NS's and NPBL's anticompetitive actions and the competitive landscape at NIT have already raised concerns with government officials.

The concern expressed by CSXT regarding competition at NIT is shared by other stakeholders, including government officials. For example, VPA recently submitted comments, attached here as Exhibit 4, in connection with the Board's rulemaking proceeding in Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*. POV consists of NIT and other deep-water marine terminals and inland terminals. POV explained that NIT is essentially solely-served by NS because of NS's unauthorized control of NPBL. (VPA Comments 4, 10, Nov. 7, 2023, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2).) POV indicated that the sole-served arrangement "introduces additional operations and costs for POV and shippers to move rail cargo through the port." (*Id.* at 5.)

On April 13, 2018, VPA's then-CEO and Executive Director, John F. Reinhart, wrote to NPBL's President and General Manager, Cannon Moss, to { [REDACTED] } (Ex. 5, Letter from VPA to NPBL 1.) Mr. Reinhart emphasized that { [REDACTED] } (*Id.*) Mr. Reinhart requested { [REDACTED] } { [REDACTED] } (*Id.*) Clearly, given CSXT's inability to move a single intermodal train to NIT since Mr. Reinhart's letter, NS succeeded in manipulating NPBL to continue to exclude CSXT from the market.

In addition, on February 19, 2025, counsel for CSXT received a letter from USDOJ stating that the Antitrust Division has opened an investigation into alleged

exclusionary conduct undertaken by NS and NPBL against CSXT, a potential violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.

3.2.5. Since this transaction does not meet the standard for a “minor” designation, the Board must determine that the transaction is “significant.”

As discussed above, “[a] transaction is to be classified as ‘significant’ unless the application shows on its face (1) that the transaction clearly would not have any anticompetitive effects, or (2) that any anticompetitive effects would clearly be outweighed by the anticipated contribution to the public interest in meeting ‘significant’ transportation needs.” *CP/DM&E*, FD 35081, slip op. at 5.

Here, the STB has been aware of the serious competitive concerns relating to NS’s unlawful manipulation of NPBL since at least 2018, and this Petition to Reject outlines further competitive concerns related to NS’s ongoing conduct. It cannot be disputed that “the record currently before the Board does not *clearly* establish that the transaction would not have any anticompetitive effects.” *CSX/Pan Am*, FD 36472, slip op. at 10 (emphasis in original). *See also CP/DM&E*, FD 35081, slip op. at 6-7 (“Applicants’ submission . . . does not clearly establish that there would be no other anticompetitive effects that might result from the transaction.”).

Furthermore, in light of the record and the lack of any public benefits explicitly asserted by NS,¹⁷ the Board cannot determine that any anticompetitive effects of the transaction will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. *See CSX/Pan Am*, FD 36472, slip op. at 11 (“Based on the information the Board has about the possible competitive impacts today, the Board is unable to conclude at this stage that any anticompetitive impacts would clearly be outweighed by the

¹⁷ CSXT will establish that no public benefits will flow from the Board’s authorization of control, and indeed, it would be contrary to the public interest for NS and NPBL to continue to exclude CSXT from on-dock rail access to NIT.

potential contribution to the public interest in meeting significant transportation needs.”).

Since the Board cannot clearly make either of the determinations under 49 C.F.R. 1180.2(b), the Board must classify the transaction as “significant.” Finally, classification of the NS proposal as “minor” would have a real effect by prejudicing the ability of CSXT or other interested parties to file responsive or inconsistent applications requesting relief such as inclusion in the transaction or terminal trackage rights. *See* 49 C.F.R. § 1180.4(d)(1) (“No responsive applications shall be permitted to minor transactions.”).

3.3. The Board should direct NS not to file a significant application until the pending antitrust litigation is complete.

As noted above, in response to issues referred to the STB by the District Court, the STB found that NS never obtained the necessary authority to control NPBL and directed the parties to address NS’s unauthorized control issue after the completion of the lawsuit. *NS Pet. for Declaratory Order*, FD 36522, slip op. at 17 n.25.

CSXT fully expects to prevail in its appeal of the District Court’s decision and to continue to prosecute its antitrust case against NS and NPBL. However, CSXT has also begun planning to address the Board’s request that the parties “take appropriate steps to address the unauthorized control issue” if and when CSXT’s appellate options are exhausted. Indeed, CSXT has reached out to NS and NPBL with a proposed approach to address the control issue. NS refused to engage with CSXT’s proposal and instead prematurely filed its application, seeking to address its decades-long unauthorized control of NPBL by formally obtaining STB authority for that control.

The Board would benefit from the District Court’s findings about NS’s and NPBL’s anticompetitive actions in any Board proceeding that would address NS’s

unauthorized control of NPBL, including in any proceeding where NS submits a complete and proper application asking the Board to authorize its control of NPBL. Therefore, CSXT requests that the Board direct NS to not refile a significant application seeking control authority regarding NPBL until after resolution of CSXT's District Court proceeding, including any appeals.¹⁸

4. CONCLUSION

For the reasons set forth above, CSXT respectfully requests that the Board issue a decision within the initial 30-day window that: (1) classifies NS's proposal as "significant," (2) rejects the NS minor application as untimely and incomplete, and (3) directs NS not to file a significant application seeking control authority regarding NPBL until after resolution of CSXT's District Court proceeding, including any appeals.

Respectfully submitted,

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Dated: February 27, 2025

¹⁸ Additionally, CSXT strongly opposes the expedited procedural schedule proposed by NS. (*See* NS Mot. for Proposed Procedural Schedule, Feb. 14, 2025.) However the Board classifies NS's proposal, the Board should not establish an expedited schedule given the importance of the competitive issues raised.

REDACTED - TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

EXHIBIT 1

DISTRICT COURT LITIGATION

COMPLAINT

REDACTED - TO BE PLACED ON PUBLIC FILE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,
individually and on behalf of NORFOLK
& PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Plaintiff,

v.

Civil Action No. 2:18cv530

NORFOLK SOUTHERN RAILWAY
COMPANY, NORFOLK & PORTSMOUTH
BELT LINE RAILROAD COMPANY,
JERRY HALL, THOMAS HURLBUT,
PHILIP MERILLI, and CANNON MOSS,

Defendants.

_____ /

COMPLAINT

Plaintiff CSX Transportation, Inc. (“CSXT”), individually and on behalf of Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”), by counsel, files this Complaint against Defendants Norfolk Southern Railway Company (“NS”), NPBL, Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss as follows:

NATURE OF THE ACTION

1. The NPBL is a terminal switching railroad operating in the cities of Norfolk, Portsmouth, and Chesapeake, Virginia. It was formed in 1896 by a collection of railroads, who entered into an agreement “for the mutual benefit of each

in the interchange of business” to build and operate a belt line railway connecting various tracks of the eight railroads in Hampton Roads that would enable the interchange of cars among the railroads and connection to the port, among other facilities. In building and operating the NPBL, the founders sought to ensure that all railroads would have ready access to industries and ports which would ensure competition for transportation services. Toward that end, rail service to the Norfolk International Terminals (“NIT”) was opened in 1917.

2. As a result of mergers and acquisitions among the original eight railroads, by the end of the twentieth century the number of NPBL members had decreased to three. In the late 1980’s, the then-remaining three shareholders of NPBL—CSXT, Norfolk and Western Railway Company, and Southern Railway Company—agreed to reapportion the amount of amount of board seats associated with each shareholder. Critically, this reapportionment did not result in any single shareholder possessing majority control of the board, and indeed no single shareholder at that time owned a majority of the shares. After this reappointment, however, Norfolk and Western Railway Company and Southern Railway Company merged, with the result being that the new company, NS, owning 57% of the shares of NPBL, as compared to CSXT’s 43%. For at least the past ten years, NS has inserted former NS employees in all management positions of the NPBL and current or former NS employees in four of the six NPBL Board of Directors voting positions

and one non-voting director. NS and these directors and the NPBL management they put in place have conspired to operate the NPBL in order to benefit NS at the expense of the profitability and viability of the NPBL, and to harm NS's competitor CSXT.

3. NS and the NPBL's conspiracy to operate the NPBL to pursue illegitimate ends is nowhere more vividly demonstrated than at the NIT, the largest international shipping terminal in Virginia. Only two entities have the ability to access NIT by rail: NPBL and NS. Currently, NPBL must utilize NS tracks in order to reach NIT. NS and the NPBL have used the NPBL as a chess piece to establish and maintain NS's monopolistic control over intermodal transportation¹ in and out of NIT by making it practically impossible for any other rail carriers to provide intermodal rail service to NIT. This has kept out competitors, but it has come at the expense of NPBL's own interests. NS and NPBL have acted in concert to have NPBL demand a rate designed to exclude competition in the relevant market, dispose of NPBL's key rail assets, and take other actions contrary to NPBL's business interests. Though NIT has been rapidly expanding and increasing its revenues in recent years due to increased shipping, NPBL's revenues have tellingly remained flat or decreased.

¹ Intermodal is the use of two modes of freight, such as ship and rail, to transport goods from shipper to consignee.

4. The Virginia Port Authority (“VPA”) has indicated that the growing port would benefit from multiple rail carriers being able to access NIT because it would allow more volume to be moved at competitive prices. And yet, at this point, competitors such as CSXT are practically precluded from using the NPBL to connect to NIT because the rate set by NPBL’s board, in concert with NS, is prohibitively expensive and because NS refuses to allow NPBL to handle intermodal trains over its tracks on a regular basis. The only modern example in which CSXT actually utilized NPBL to connect to NIT occurred in 2015 when, due to closures of other ports around the country, the NIT was inundated with excess containers and because of demands from its customers, CSXT was forced to pay the high rate charged by the NBPL. This was the briefest of windows in which CSXT could feasibly pay these rates because the other port closures caused all costs associated with ocean shipping to temporarily skyrocket. Under normal business conditions, the NPBL’s rate and its operating procedures effectively preclude competitor access to NIT.

5. CSXT wants to compete on fair terms at NIT, but has been unable to do so. This condition exists despite the fact that the NPBL was created for the very purpose of fostering cooperative access for railroad carriers. CSXT’s recent proposal to NPBL to set a competitive rate and improve its services—including by volunteering the use of CSXT’s own engines and fuel to perform NPBL’s services—was summarily quashed by NPBL’s board and management despite the projections

that CSXT's proposal would have substantially increased NPBL's business and revenues.

6. NS's actions have resulted in the loss of existing and prospective intermodal business for CSXT. It has also harmed the market by foreclosing competition for intermodal transportation servicing NIT. And it has reduced revenue and income to the NPBL, which earns revenue and income by charging fees for interchange of trains and the use of its track.

PARTIES

7. CSXT is a Class I railroad operating in the Eastern United States and Canada. CSXT is headquartered in Jacksonville, Florida and is incorporated under Virginia law. It brings this suit on its own behalf and also in a derivative capacity as a shareholder of NPBL.

8. NS is also a Class I railroad operating in the Eastern United States and Canada. NS is headquartered in Norfolk, Virginia and is incorporated under Virginia law.

9. The NPBL is a Class III terminal switching railroad. It is headquartered in Chesapeake, Virginia, and is incorporated under Virginia law.

10. Individual Defendants Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss are voting members of the NPBL Board of Directors, who, *inter alia*, participated in the rejection of CSXT's most recent service proposal. Hall, Hurlbut,

and Merilli are also employees of NS. Moss is a former employee of NS and has been the President and General Manager of NPBL since 2011. The Individual Defendants are named as party defendants in Count VI only, but the conduct of the Individual Defendants is relevant to the other counts of the Complaint.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because CSXT's claims against Defendants arise under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and therefore raise federal questions.

12. The Court has supplemental jurisdiction over all state law claims under 28 U.S.C. § 1367(a).

13. This Court has personal jurisdiction over the Defendants because they are residents of Virginia, regularly conduct business in Virginia, and/or caused injury by acts in Virginia.

14. Pursuant to 28 U.S.C. § 1391(b), venue is proper in this Court because a substantial part of the events giving rise to this dispute occurred within this District.

FACTUAL ALLEGATIONS

The Purpose and Structure of the NPBL

15. In 1896, eight railroads, including CSXT and NS's predecessors in interest, joined together to form the NPBL in order to provide an efficient means of interchanging the traffic of its owners between their lines and various marine

terminals and industries located along the NPBL's tracks. In 1897, they signed the NPBL Operating Agreement, attached hereto as Exhibit A. The joint agreement between the railroads was designed to ensure that all railroads would have ready access to NIT, which would ensure competition for transportation services.

16. The NPBL Operating Agreement, as amended, governs the ownership and operation of the NPBL, and it creates and establishes various duties and obligations between and among the shareholders.

17. In order to advance the purpose for which the NPBL was formed, the original shareholder companies, the predecessors of the current shareholders and parties to the NPBL Operating Agreement, expressly agreed therein that the NPBL would be a "separate organization in which all [railroads] are to be equally interested and each to have an equal representation." Ex. A at 1. The shareholders agreed that it is in the best interest of all that each shareholder company have "equal representation" in the organization; and accordingly the Operating Agreement provides that each shareholder "shall have one representative on the Board" of the NPBL. *Id.* at 1–2.

18. The Operating Agreement further provides that each shareholder must "co-operate cordially in encouraging the business of the [NPBL] for which it is constructed." *Id.* at 4. Under the Operating Agreement, the NPBL anticipates that its shareholders will deliver to the NPBL all cars to be delivered to customers that

they cannot serve directly. *Id.* CSX thus has an expectation that the NPBL will provide it with an efficient means of interchanging its traffic including, without limitation, to and from the NIT. *Id.* at 6 (referencing “the intent” that the NPBL “shall perform the service for which it was built and said Company be directly responsible for the competent and efficient discharge of its every obligation to the parties hereto”).

19. Further, under the NPBL Operating Agreement, the members of the NPBL Board of Directors are obligated to vote for “such resolutions, by-laws or other proceedings as may be necessary to carry into effect the agreements made in” the NPBL Operating Agreement. *Id.* at 6.

20. The NPBL currently operates over 26 miles of track in and around the Hampton Roads area of Virginia. A map of the NPBL and the tracks owned by other railroads in the area is attached hereto as Exhibit B. Crucially, the NPBL provides a means of access to the largest port in Virginia and one of the largest ports on the Eastern Seaboard, NIT. For any rail carrier other than NS, the only way to access NIT by rail is via NBPL. Being accessible by deep-draft ships and operating some of the world’s largest cranes, NIT is uniquely positioned to handle some of the largest ships in the world. Yet NS, together with NPBL, through NPBL directors and managers, has essentially blocked access to this large and growing port facility for anyone but itself.

The Supplemental Agreement

21. As a result of mergers and acquisitions among the original eight railroads, by the end of the twentieth century the number of NPBL members had decreased to three. By 1989, the number of shareholder railroads owning the NPBL had declined to three—CSXT, Norfolk and Western Railway Company (“NW”) and Southern Railway Company (“SR”).

22. In a Supplemental Agreement dated March 1, 1989, attached hereto as Exhibit C, the three railroads agreed that CSXT was afforded the right to appoint two representatives to the NPBL Board of Directors, and the other two companies, NW and SR, collectively between them were afforded the right to appoint three representatives to the NPBL Board. Ex. C ¶ 1. The Supplemental Agreement further provided that other than the single sentence of the Operating Agreement specifically referenced, “[n]othing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement.” *Id.* ¶ 2.

23. The following year, NW and SR merged to form the single company now known as Norfolk Southern Railway Company. The merger of those two companies left NS and CSXT as the only remaining shareholders of the NPBL. As a result, NS owns 57% of NPBL, and CSXT owns 43%. Per the NPBL By-Laws, which have been effect in their current form since 1996, attached hereto as Exhibit

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D, NS has appointed four voting members to the NPBL Board of Directors and CSXT has appointed two.

24. NPBL, a distinct corporation under Virginia law, remains an independent entity from its two remaining shareholders, NS and CSXT. It operates according to its own bylaws and with its own management and Board of Directors. The railroads and NPBL lack economic integration, and the interests of NPBL can diverge from its railroad shareholders where higher prices mean higher revenue for NS but more cost for NPBL. The conspiracy described below between NPBL and NS thus joined together separate decision-makers pursuing separate economic interests, depriving the marketplace of independent centers of decision-making.

NPBL's Deteriorating Financial Condition

25. Rather than abide by the original purposes of the Operating Agreement, including the requirement to cordially cooperate in encouraging the business of NPBL, NS and the management of the NPBL conspired to operate the NPBL to harm CSXT and the market, even at the expense of the NPBL's own business interests.

26. The NPBL Board of Directors currently consists of six voting members and one non-voting member. Three of those voting positions are filled with current NS employees designated by NS to serve as NPBL Directors: Defendants Hall, Hurlbut, and Merilli.

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27. Another voting position is held by the NPBL President, Cannon Moss, a former NS employee who in 2011 was nominated at NS's direction and elected by vote of NS's shares, and over CSXT's objection. Defendant Moss's predecessor, David Stinson, was also a former NS employee and returned to work at NS after his tenure as NPBL President. Donna Coleman, the current non-voting member of the Board of Directors and Vice President of NPBL, is also a former employee of NS. In addition, Bill O'Brien, the current Terminal Superintendent of NPBL, is also a former employee of NS.

28. NS also has other connections with the management of the NPBL. The management of NPBL all have NS email addresses, which they use to conduct the business of the NPBL.

29. For at least 12 years, every President and VP of NPBL was a former NS employee.

30. All of the individual Defendants have independent personal stakes in furthering NS's interests as Directors of NPBL, such as the expectation of future employment with NS and the expectation of future remuneration from NS.

31. Collectively, Defendant Moss, in his capacity as a Director, along with Defendants Hall, Hurlbut, and Merilli constitute the four "Individual Defendants."

32. NS in conspiracy with the NPBL, and through the Individual Defendants, have operated the NPBL as a vehicle for advancing NS's interests at the

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expense of their contractual duties to CSXT. The Individual Defendants, in advancing NS's interests regardless of the impact on NPBL, have further violated their fiduciary duties to NPBL. Management of NPBL conspired with NS to harm CSXT and grow NS's market power.

33. The NPBL's operating revenue is derived principally from switch operations, and is largely dependent upon the switch services being provided to the shareholders' companies, who in turn pay for those services.

34. Defendants have caused the NPBL to establish and maintain unreasonably high rates for its switch services for intermodal freight. The current line haul switch rate is dramatically higher than rates for comparable services charged by other short line railroads. This rate was adopted by the Individual Defendants and/or their predecessors in 2009, over the objection of the other NPBL board members.

35. The rates charged by the NPBL and other anticompetitive restrictions on CSXT's use of the NPBL have effectively foreclosed CSXT from moving containers to or from NIT on the NPBL. Meanwhile, NS is able to access NIT directly via its own rail connections.

36. The Defendants' actions as to NPBL are adversely affecting commerce in Hampton Roads and Virginia. The VPA has expressly requested that NPBL "facilitate dual [rail] access [by CSXT and NS] for handling containers at NIT,"

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because NPBL's current failure to provide "proper access to NIT by CSX puts Virginia at a competitive disadvantage." Indeed, the Defendants' activity is raising prices charged to shippers and, ultimately consumers, because NS has shut out the only other company who could compete to provide intermodal services.

37. In part as a result of its excessive line haul switch rate, the NPBL's overall financial performance has been declining over the past several years and continues to deteriorate. NPBL's revenue has essentially been flat or down over the past several years, including in 2017. And, the bottom line revenue of NPBL is deceptive, however, because much of NPBL's revenue in recent years has been generated from the sale of real estate. Rail car volume has been essentially flat for years, and decreased in 2017. Current car volume on the NPBL as a whole is heavily dependent on a single customer (not at NIT) engaged in a single line of business. No new sources of substantial and recurring business have been added in recent years, nor do any appear to be planned. No excess cash flow is being generated that could be used for capital expenditures for maintenance, upgrades, or expansion.

The Individual Defendants' Repeated Failures to Act in the Best Interest of the NPBL and to Abide by the NPBL Operating Agreement

38. In advance of the April 18, 2018 NPBL Board and stockholders meetings, CSXT presented a Service Proposal that would have significantly and rapidly increased the NPBL's revenue and operating income by nearly doubling the

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volume of cars that the NPBL moves annually. A copy of the Service Proposal is attached hereto as Exhibit E.

39. The Service Proposal, which included a proposed substantially lowered switch rate per car, as well as a guarantee of a minimum annual volume of CSXT moving 18,000 cars to or from NIT, would have generated annually approximately \$1,440,000 in incremental revenue and potentially \$660,000 in incremental operating income for the NPBL. The Service Proposal would have provided the NPBL with a consistent, long-term and substantial stream of much-needed additional income, and should have generated new revenue opportunities for the NPBL.

40. Rather than engage in any discussions to advance that proposal and secure those financial benefits, the Individual Defendants and NPBL Management erected baseless and pretextual barriers to the NPBL without even considering or responding substantively to, much less adopting, the Service Proposal. The Individual Defendants refused to even form an independent committee to evaluate it or allow a formal vote, and thus effectively rejected it. Notably, at the April 18, 2018 Board and shareholder meetings, the Individual Defendants parroted the same pretextual reasons for denying the request as offered by NS in its responses to CSXT's Service Proposal.

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41. Additionally, in response to CSXT's proposal, Defendant Moss revealed that they were considering entering into a new agreement, ostensibly between the NPBL and NS, that effectively would impose a substantial increase in charges paid to NS for NPBL's usage of its rights of access to NS's track, which would, in turn, reduce the profitability of intermodal service for NPBL while ultimately raising the rates charged to NPBL customers. Regardless of what the appropriate charge should be, the timing of this interest by NPBL in finalizing a new deal between NS and NPBL is highly suspicious and consistent with Defendants' other ploys using the NPBL to keep CSXT from servicing the NIT.

42. By rejecting the Service Proposal, Defendants' actions have prevented NPBL from providing switch services necessary for CSXT to move intermodal containers by rail to and from NIT, thereby depriving CSXT of an efficient means of serving NIT, which in turn has impaired CSXT's business interests and prevented it from using the NPBL's services to and from NIT, causing the attendant loss in revenue and income to NPBL.

43. NPBL's lost income from not providing the proposed service to CSXT in turn impairs NPBL's ability to finance and make capital investments in its infrastructure necessary to preserve and grow the railroad's business and serve its shareholders in the manner required by the Operating Agreement, and effectively

blocks the NPBL from providing a second (“dual”) means of access by rail to NIT (in addition to service by NS itself), as expressly requested by the VPA.

44. Defendants’ imposition of unreasonable and anticompetitive rates harms everyone (including NPBL, CSXT, freight shippers, and other competitors) except NS. Notably, NS itself has been able to avoid having to pay the unreasonable and anti-competitive NPBL rates set by the Individual Defendants for intermodal rail service because NS owns and operates over the sole rail line that connects to NIT, the same line that NPBL operates over to access NIT.

45. This is not the first time that the Individual Defendants have, in conspiracy with NS and the NPBL, misused NPBL as a tool to serve NS’s own interests.

46. As one example, in response to a CSXT service proposal in 2010, NPBL refused to accept CSXT’s offer to provide CSXT locomotives and free fuel to move cars for NPBL over the NPBL routes under any terms or circumstances (including without charge to NPBL for use of the locomotives or fuel), while permitting locomotives owned by NS to do so and causing NPBL to lease or contract with NS for use of NS’s locomotives without competitive bidding.

47. In 2008, NPBL took the necessary actions to commence the sale of productive NPBL property in Norfolk and an attempted sale in Portsmouth, and the termination of NPBL’s access rights over NS tracks used for the proper delivery of

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services that NPBL is obligated to provide to its shareholders (including the consent to NS's removal of a "diamond" key to NPBL providing adequate, reasonable, efficient and predictable access to NIT). The sale of property in Norfolk had the potential to further constrain NPBL's connection to NIT. The sale of property in Portsmouth, had it been successful, would have effectively limited CSXT's access to its own intermodal yard in Portsmouth. The removal of the "diamond" has resulted in having to move NPBL trains into NS's Portlock yard, where further movement of those NPBL trains is controlled and constrained by NS and NS's own trains, and then reversing the NPBL trains out of that yard to move to or from NIT.

48. Through those same acts and practices, and others, the Individual Defendants and/or their predecessors have violated their fiduciary obligations to act in the best interests of the NPBL and, by conspiring with them to do so, NS has violated its contractual obligations to CSXT, including but not limited to its obligation to "encourage[e] the business of the [NPBL]."

Relevant Markets

49. The relevant geographic market is the intermodal port facilities of Hampton Roads, Virginia. The Hampton Roads metropolitan area has three ports through which freight travels, Portsmouth Marine Terminal ("PMT"), Virginia International Gateway ("VIG"), and NIT. But, with very limited exceptions, PMT has not handled intermodal freight since 2011 and is not expected to going forward.

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Ports outside of the Hampton Roads metropolitan area face significant barriers to competing with the Hampton Roads' ports. In particular, the distance between the port complexes on the East Coast effectively prevent such port complex from acting as viable potential competitors. For example, the closest port complex to the south of Hampton Roads is Charleston, South Carolina, more than 430 miles away. And the closest port complex to the north of Hampton Roads is Baltimore, Maryland, more than 230 miles away. Shippers choose which port complex to use based on geographic considerations—where the freight is coming from and headed.

50. Freight transportation by rail in and out of the Hampton Roads' ports constitutes a distinct service market under the antitrust laws. Rail transportation is the only method that can achieve the level of throughput required for major shippers of freight. Indeed, major customers refuse to contract with carriers who cannot provide rail transportation in and out of the Hampton Roads' ports. Moreover, the market for freight transportation by rail in and out of the Hampton Roads ports is characterized by high barriers to entry. Development of rail connections requires significant capital investment and engineering. As such, there is no significant cross-elasticity of demand or reasonably interchangeable alternatives for freight transportation by rail in and out of the Hampton Roads' ports.

Defendants' Anti-Competitive Actions to Achieve Dominance of Freight Transportation by Rail In and Out of the Hampton Roads' Ports

51. NS and the NPBL have used the NPBL as a chess piece to establish and maintain monopolistic control over intermodal transportation in and out of the Hampton Roads' ports.

52. NS has monopoly power or a dangerous probability of achieving monopoly power in the relevant market described above. NS is one of the nation's largest railroads, operating in 22 states. In the relevant market, NS's market share exceeds 70%. For the NIT, NS's market share is approximately 90%. NS has the ability to control prices for intermodal transportation and exclude competition. It benefits from a significant barrier to entry into the market for intermodal transportation in and out of Hampton Roads ports, namely the lack of accessible rail routes for competitors that are not owned by NS to the NIT.

53. NS did not secure or maintain its monopoly power in Hampton Roads by virtue of its ingenuity or other salutary competitive behavior. Rather, it has continually and deliberately engaged in a pattern of anticompetitive conduct that has eliminated or prevented competition.

54. Among other anticompetitive acts, NS, in conspiracy with the Individual Defendants and NPBL, has caused the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby effectively denying CSXT access to NIT by rail in competition with NS.

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55. When CSXT was forced to pay the NPBL's rates in 2015, due to closures of other ports around the country, NS directly, and through the NPBL, prioritized NS's shipping needs over those of CSXT. NS failed to allow, in a reasonable and timely manner, the movement of cars delivered to NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver.

56. NS conspiring with NPBL, by and through the Individual Defendants, have discriminated against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access NIT, requiring only NS-owned or supplied locomotives to be used by or on NPBL.

57. NS conspiring with NPBL, by and through the Individual Defendants, have set (and maintained) NPBL's switch rates at levels designed to exclude competition in the relevant market, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by NPBL.

58. NS conspiring with NPBL, by and through the Individual Defendants, and/or their predecessors, mandated NPBL consent to the termination of its access rights to the track between NS Juncture and Carolina Juncture, *i.e.*, the "diamond" and connecting track (with NS then removing that track), and mandated NPBL cease and desist from requesting the reinstatement of the diamond, connecting track and related operating rights, all of which has severely impaired, and continues to severely

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impair, NPBL's ability to efficiently and predictably provide CSXT with rail access to NIT.

59. In response to CSXT's Service Proposal, NS and NPBL, by and through the Individual Defendants, threatened to enter into an agreement that would increase dramatically the charges that NPBL would pay for access to NS's track. This would have further raised the rate charged to NPBL's customers. This threat to increase rates was an attempt to pressure CSXT into abandoning its Service Proposal.

60. NS and NPBL, by and through the Individual Defendants, have taken these and other actions with the intent and effect of denying CSXT and other competitors the ability to compete with NS to provide freight rail transportation in and out of the shipping ports in the Norfolk area.

61. These acts are contrary to the independent profit-maximizing self-interest of NS and the NPBL, as they increased costs and reduced revenue for NPBL, of which NS is a majority owner.

62. Rather than try to compete on the merits, Defendants, through this willful exclusionary conduct, have acted to acquire and wield power over price and to exclude competition, and thus to monopolize (and attempt to monopolize) intermodal transportation in and out of Hampton Roads' ports.

63. Defendants' actions were within the flow of, and substantially affected, interstate and international commerce. Defendants also used instrumentalities of

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interstate or foreign commerce (or both). And their activities have had a direct, substantial, and reasonably foreseeable effect on interstate and international commerce.

Harm to CSXT and Competition

64. The result of Defendants' actions has been a loss in existing and prospective business for CSXT and, in turn, for the NPBL. Defendants, conspiring together, have pushed CSXT out of the market for intermodal transportation through NIT.

65. In addition, Defendants' actions have harmed competition for intermodal transportation in and out of Hampton Roads' ports, with customers paying substantially higher prices for that transportation via rail service provided by NS, than they would absent Defendants' anticompetitive conduct.

66. Defendants' actions have also resulted in reduced choice among shippers for intermodal options from Hampton Roads' ports.

The Individual Defendants' Refusal to Remedy Defects in the NPBL's Current Corporate Governance Structure

67. CSXT also proposed, both before and at the April 2018 NPBL Board and shareholders' meetings, several remedial actions to address defects in NPBL's current corporate governance structure. A copy of the proposal is attached hereto as Exhibit F.

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68. Those remedial actions would have 1) allowed for equal representation of NPBL shareholders on NPBL's Board; 2) added independent directors to a Board that currently has none; 3) mitigated NS's improper influence over the NPBL Board and management, which NS has used to its sole advantage and to cause NPBL and the Individual Defendants, together with NS, to violate fiduciary, contractual and statutory duties; and 4) ultimately allowed the NPBL to operate as a "separate organization," as required by the NPBL Operating Agreement.

69. Among other things, CSXT proposed that each shareholder designate only one individual for election as a director; that the shareholders elect four independent directors to the NPBL Board; and that the Board and shareholders implement a plan for an orderly transition to independent management.

70. At the April 2018 meetings, CSXT's shareholder representative asked the NPBL Board to adopt CSXT's proposals, and made a motion that the shareholders proceed to elect only one director designated by each shareholder and elect four independent directors.

71. Prior to the meetings, CSXT also identified and proposed to NS eight candidates for election as independent directors to fill the remaining four positions on the NPBL Board.

72. The Individual Defendants rejected CSXT's governance proposal in its entirety, voted against CSXT's motion, refused to nominate (much less elect) any

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independent directors, and instead insisted upon, and NS voted to approve, a slate that included four (interested) directors designated by NS (three current NS employees, Defendant Cannon Moss, and Donna Coleman (as a non-voting director)) and only two directors designated by CSXT.

73. The Individual Defendants have not offered any legitimate and valid reasons for their refusal to take any steps to remedy the NPBL's corporate governance failures, despite the fact that their position is contrary to the NPBL Operating Agreement and Virginia law barring interested director transactions, Va. Code § 13.1-691, and means that NPBL can no longer effectively operate as a corporation where NS and CSXT are at loggerheads and recent proposals to benefit NPBL are rejected out of hand.

74. Instead, the Individual Defendants have merely parroted NS's self-serving and invalid argument that the changes CSXT proposed are "unnecessary."

75. NS has conspired with NPBL, through the NPBL Board, management, and operation of the railroad, to exclude CSXT from the market.

76. The Individual Defendants, in combination with NS, have acted in violation of the law and in breach of their fiduciary, contractual, and statutory duties to NPBL.

COUNT I
(Violation of Sherman Act § 1, 15 U.S.C. § 1: Conspiracy to Restrain Trade
Against Defendants NS and NPBL)

77. CSXT incorporates and realleges the allegations of paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. Defendants NS and NPBL agreed to and did participate in anticompetitive conduct that unreasonably restrained trade and commerce. Thus, Defendants engaged in combination and conspiracy and violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

79. NS conspired with NPBL and the Individual Defendants to take actions and implement policies that effectively foreclosed CSXT from utilizing the NPBL to compete in the provision of multi-modal services at NIT.

80. This conspiracy has served to enhance and further solidify NS's monopoly power in the relevant market, which has had the effect of severely restricting supply and increasing the prices charged to customers for intermodal transportation.

81. Defendants' anticompetitive conduct is a *per se* violation of Section 1 of the Sherman Act.

82. Alternatively, even if Defendants' anticompetitive conduct is judged under the antitrust Rule of Reason, there is no legitimate business justification for Defendants' actions and the conduct through which they adopted and implemented their combination and conspiracy. Moreover, the anticompetitive effects of Defendants' conduct far outweigh any conceivable procompetitive benefits or

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justifications. Even if such a justification existed, any possible procompetitive benefits could have been obtained by less restrictive alternatives.

83. As a direct and proximate result of Defendants' combination and conspiracy, Defendants have unreasonably restrained trade and commerce. They have excluded actual and potential competition from the relevant market, and profited from their anticompetitive conduct by establishing and maintaining artificially high prices for intermodal transportation services provided to customers, and by otherwise reaping financial benefits from their combination and conspiracy.

84. As a direct and proximate result of Defendants' combination and conspiracy, CSXT and consumers have been injured. The injury consists of paying artificially inflated prices for intermodal transportation—prices higher than consumers and CSXT would have paid absent Defendants' combination and conspiracy. Their injuries are what the antitrust laws were designed to prevent and flow directly from Defendants' conduct.

COUNT II
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Conspiracy to Monopolize
Against Defendants NS and NPBL)

85. CSXT incorporates and realleges the allegations of paragraphs 1 through 84 of this Complaint as if fully set forth herein.

86. Defendants NS and NBPL acted with a specific intent to combine or conspire to monopolize and to destroy competition in the relevant market.

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Defendants devised and implemented a plan in furtherance of the conspiracy to systematically eliminate competition in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

87. NS conspired with NPBL and the Individual Defendants to willfully engaged in a course of exclusionary conduct in furtherance of the conspiracy to obtain a monopoly in the relevant market, including:

- (a) causing the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

- (b) failing to allow the movement of, in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

- (c) discriminating against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access NIT, while requiring NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

- (d) setting the NPBL's switch rates at levels designed to exclude competition in the relevant market for comparable switch rates, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

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(e) causing NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the “diamond” track (with NS then removing that track), which has severely impaired NPBL’s ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercise of the NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

88. Defendants do not have a legitimate business purpose for any of their anticompetitive conduct in furtherance of the conspiracy. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. Defendants’ conduct does not result in greater competition in the relevant market. The only “benefit” that flows from Defendants’ conduct is a reduction in competition, and that benefit inures only to NS’s advantage, not to that of customers or competition in the relevant market.

89. Defendants’ anticompetitive acts in furtherance of the conspiracy to monopolize have injured competition in the relevant market, suppressed CSXT’s provision of intermodal transportation, and the provision of intermodal

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transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

90. Defendants' overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT III
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Monopolization Against Defendant NS)

91. CSXT incorporates and realleges all of the allegations of paragraphs 1 through 90 this Complaint as if fully set forth herein.

92. Defendant NS's conduct constitutes the intentional maintenance of monopoly power in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

93. For the purpose of maintaining its monopoly power, NS committed numerous anticompetitive acts, including:

(a) causing NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

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(b) failing to allow the movement of in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

(c) discriminating against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access the NIT, while requiring NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

(d) setting the NPBL's switch rate[s] at levels designed to exclude competition in the relevant market, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

(e) causing NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the "diamond" track (with NS then removing that track), which has severely impaired NPBL's ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercise of the NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

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94. NS has excluded CSXT from the relevant market and has deprived consumers of the benefits of competition among rail carriers.

95. NS does not have a legitimate business purpose for any of its anticompetitive conduct. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. NS's conduct does not result in greater competition in the relevant market. The only "benefit" that flows from NS's conduct is a reduction in competition, and that benefit inures only to NS's advantage, not to that of customers or competition in the relevant market.

96. NS's monopolization has injured competition in the relevant market, suppressed CSXT's provision of intermodal transportation, and the provision of intermodal transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

97. NS's overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT IV
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Attempted Monopolization
Against Defendant NS)

98. CSXT incorporates and realleges the allegations of paragraphs 1 through 97 of this Complaint as if fully set forth herein.

99. Defendant NS acted with a specific intent to monopolize and to destroy competition in the relevant market. NS devised and implemented a plan to systematically eliminate competition in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

100. NS willfully engaged in a course of exclusionary conduct to obtain a monopoly in the relevant market, including:

(a) causing the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

(b) failing to allow the movement of, in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

(c) discriminating against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access the NIT, while causing NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

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(d) setting the NPBL's switch rates at levels designed to exclude competition in the relevant market for comparable switch rates, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

(e) mandating NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the “diamond” track (with NS then removing that track), which has severely impaired NPBL’s ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercising NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

101. NS does not have a legitimate business purpose for any of its anticompetitive conduct. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. NS’s conduct does not result in greater competition in the relevant market. The only “benefit” that flows from NS’s

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conduct is a reduction in competition, and that benefit inures only to NS's advantage, not to that of customers or competition in the relevant market.

102. Throughout the time NS engaged in this exclusionary conduct, it had a dangerous probability of succeeding in gaining a monopoly in and controlling the relevant market and excluding its competitors.

103. NS's attempts to destroy competition in the relevant market have injured competition in the relevant market, suppressed CSXT's provision of intermodal transportation, and the provision of intermodal transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

104. NS's overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT V
(Breach of Contract, against Defendant NS)

105. CSXT incorporates and realleges the allegations of paragraphs 1 through 104 of this Complaint as if fully set forth herein.

106. CSXT and Defendant NS are co-parties to the NPBL Operating Agreement, which establishes legally enforceable obligations owed by NS to CSXT.

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These include, but are not limited to: 1) that shareholders shall maintain and operate NPBL as a “separate organization in which all are to be equally interested,” 2) NS will “co-operate cordially in encouraging the business of the [NPBL] for which it is constructed,” 3) NS shall “deliver to [NPBL] all cars to be interchanged with other [parties to the agreement],” 4) NS shall ensure its Directors “vote for such resolutions, by-laws or other proceedings as may be necessary to carry into effect” the NPBL Operating Agreement, and 5) the implied covenant of good faith and fair dealing.

107. Defendant NS has breached these contractual obligations by, *inter alia*, effectively blocking CSXT’s access to NS’s trackage over which NPBL has rights, by refusing to consider proposals that would improve the revenues of NPBL, by failing to encourage the business of NPBL, and by inducing its employees and/or the Individual Defendants to vote for measures that are harmful to NPBL.

108. NS’s breaches have harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, by causing CSXT to pay high rates when it has utilized the NPBL, and by causing CSXT to lose potential business due to its inability to economically access NIT by rail.

COUNT VI (Derivative Claim)
(Breach of Fiduciary Duties, against Individual Defendants Hall, Hurlbut,
Merilli, and Moss)

109. CSXT incorporates and realleges the allegations of paragraphs 1 through 108 of this Complaint as if fully set forth herein.

110. CSXT, in its capacity as a shareholder in NPBL, brings this derivative action on behalf of NPBL and its shareholders, pursuant to Va. Code § 13.1-672.1, against the Individual Defendants for their breaches of fiduciary duties. CSXT was a shareholder of NPBL at all times during the conduct complained of in this action, and it fairly and adequately represents the interests of NPBL in enforcing NPBL's rights.

111. CSXT made a written demand to NPBL to take suitable action on June 22, 2018. NPBL responded to CSXT on September 11, 2018, denying any illegal conduct and disagreeing that any action is warranted in response to CSXT's demand letter.

112. The Individual Defendants have breached their fiduciary duties to NPBL, including their duties of good faith and loyalty and to act in an honest, fair and reasonable manner in the best interests of NPBL. Instead of acting in the best interests of NPBL, they have acted predominately in the interests of NS at the expense of NPBL, by, for instance, denying CSXT's Service Proposal and proposal for reforms of NPBL's corporate governance structure, and by failing to appropriately manage NPBL, leading to its deteriorating financial condition.

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113. These breaches have damaged NPBL. CSXT, on behalf of NPBL, specifically seeks injunctive relief as specified in the prayer for relief as to the Individual Defendants.

COUNT VII
(Tortious Interference with Business Expectancy, Against Defendants NS and NPBL)

114. CSXT incorporates and realleges the allegations of paragraphs 1 through 113 of this Complaint as if fully set forth herein.

115. As a shareholder of the NPBL, CSXT has reasonable business expectancies, including that the corporation will be managed and directed in a manner that is in accord with the Operating Agreement, allowing CSXT access to NPBL trackage in Hampton Roads. CSXT reasonably expects economic benefit as a result of being a shareholder of NPBL, such as revenues from NPBL and its ability to access NPBL trackage and NPBL-served industries. As the majority shareholder of NPBL, NS, and the Individual Defendants, respectively, have knowledge of CSXT's business expectancies.

116. Defendants NS and NPBL have wrongfully employed improper methods in order to intentionally interfere with these expectancies, such as unfair competition, breach of fiduciary duty by the Individual Defendants, and using the NPBL as a means of self-dealing.

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117. Defendants' interference is without justification and privilege, and has caused CSXT damages, such as lost opportunities for contracts with shipping partners. Additionally, because Defendants' conduct was intentionally undertaken with malice to harm CSXT and benefit themselves, CSXT is further entitled to punitive damages.

COUNT VIII
(Statutory Business Conspiracy, Va. Code § 18.2-499, Against Defendants NS and NPBL)

118. CSXT incorporates and realleges the allegations of paragraphs 1 through 117 of this Complaint as if fully set forth herein

119. In violation of Va. Code § 18.2-499, Defendant NS has conspired, by express agreement and tacit understanding, with Defendant NPBL, and with the Individual Defendants, in their capacity as directors and/or managers of NPBL, to intentionally, purposefully, and without lawful justification willfully and maliciously interfere with CSXT's reasonable business expectations, violate the individual Defendants' fiduciary duties to NPBL, and to breach NS's contract with CSXT. Defendants acted without lawful justification.

120. This conspiracy has harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, and by causing CSXT to lose potential business with shipping companies, due to its inability to access NIT.

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121. In addition to compensatory damages, CSXT is entitled to treble damages, lost profits, punitive damages, attorneys' fees, and other relief pursuant to Va. Code § 18.2-500.

COUNT IX
(Civil Conspiracy, Against Defendants NS and NPBL)

122. CSXT incorporates and realleges the allegations of paragraphs 1 through 121 of this Complaint as if fully set forth herein.

123. Defendant NS has conspired, by express agreement and tacit understanding, with Defendant NPBL, and with the Individual Defendants, in their capacity as directors and/or managers of NPBL, to intentionally, purposefully, and without lawful justification willfully and maliciously interfere with CSXT's reasonable business expectations, violate the Individual Defendants' fiduciary duties to NPBL, and to breach NS's contract with CSXT. Defendants acted without lawful justification.

124. This conspiracy has harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, and by causing CSXT to lose potential business with shipping companies, due to its inability to access NIT.

125. In addition to compensatory damages, CSXT is entitled to punitive damages because the Defendants acted with malice.

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PRAYER FOR RELIEF

WHEREFORE, CSXT respectfully prays for the following:

- 1) That this Court render judgment in favor of CSXT, individually and on behalf of NPBL, and against Defendants;
- 2) That this Court award CSXT, individually and on behalf of NPBL, actual, consequential, and compensatory damages, and treble damages;
- 3) That this Court award CSXT punitive damages in amounts to be determined by the jury;
- 4) That this Court enter an injunction against Defendants from continuing to commit the above referenced violations of federal and state law;
- 5) That this Court enter an injunction against NS, NPBL, and the Individual Defendants, as appropriate, that restores CSXT's right as a co-equal shareholder and/or establishes an independent board structure as previously proposed by CSXT and that directs that NPBL approve CSXT's Service Proposal;
- 6) That this Court award CSXT its costs, attorneys' fees and litigation expenses; and
- 7) That this Court enter such other and further relief as it deems just and proper under the circumstances.

CSXT requests trial by jury on all counts so triable.

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Dated: October 4, 2018

Respectfully submitted,

CSX TRANSPORTATION, INC.

By Counsel

/s/

Robert W. McFarland (VSB No. 24021)

Benjamin L. Hatch (VSB No. 70116)

E. Rebecca Gantt (VSB No. 83180)

McGUIREWOODS LLP

World Trade Center

101 West Main Street, Suite 9000

Norfolk, Virginia 23510-1655

Telephone: (757) 640-3716

Facsimile: (757) 640-3930

E-mail: rmcfarland@mcguirewoods.com

bhatch@mcguirewoods.com

rgantt@mcguirewoods.com

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EXHIBIT A

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AFE-WP
STEP-7
7/17/87

Agreement

BETWEEN

NEW YORK, PHILADELPHIA & NORFOLK R. R. CO.,

SEABOARD AND ROANOKE R. R. CO.,

NORFOLK AND SOUTHERN R. R. CO.,

NORFOLK AND WESTERN RY. CO.,

ATLANTIC AND DANVILLE RY. CO.,

SOUTHERN RY. CO.,

NORFOLK AND CAROLINA R. R. CO.,

AND

CHESAPEAKE AND OHIO RY. CO.

DATED JULY 7, 1897.

IN RE: NORFOLK AND PORTSMOUTH BELT LINE R. R. CO.

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AN AGREEMENT made and entered into on this Seventh day of July, A. D. 1897, by and between THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, THE SEABOARD & ROANOKE RAILROAD COMPANY, THE NORFOLK & SOUTHERN RAILROAD COMPANY, THE NORFOLK & WESTERN RAILWAY COMPANY, THE ATLANTIC & DANVILLE RAILWAY COMPANY, THE SOUTHERN RAILWAY COMPANY, THE NORFOLK & CAROLINA RAILROAD COMPANY, and THE CHESAPEAKE & OHIO RAILWAY COMPANY.

WHEREAS each of the Companies above named desires to secure the construction of a Belt Line Railroad from Pinner's Point, Virginia, to a connection with the Norfolk and Western Railway in Berkley, Virginia, for the mutual benefit of each in the interchange of business, and it is conceded to be for the best interest of all that the same should be constructed, maintained and operated under a separate organization in which all are to be equally interested and each to have an equal representation, and it has been decided to construct, maintain and operate the same under the charter of The Southeastern and Atlantic Railroad Company.

Now, Therefore, This Agreement Witnesseth That the several companies hereinbefore named, each in consideration of the mutual agreements hereinafter made, do hereby mutually agree that the said The Southeastern and Atlantic Railroad Company shall be organized and its business and affairs conducted and maintained on the following terms and conditions, to wit:

First.—That the Capital Stock of the said Southeastern and Atlantic Railroad Company shall be fixed at Fifty Thousand Dollars.

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Second.—That each of the Companies above named, parties hereto, doth hereby agree to subscribe to one-eighth of the Capital Stock of said Company, and to pay for the same at such time or times and in such amount or amounts as the same may be called by the Board of Directors of said Company.

Third.—That if the said Capital Stock should at any time hereafter be increased, the same will be subscribed for and taken in equal proportions by such of the Companies above named as may then hold stock in the said Southeastern and Atlantic Railroad Company.

Fourth.—That the number of Directors of the said Southeastern and Atlantic Railroad Company shall always be fixed to correspond to the number of Companies holding stock therein, so that each of said Companies shall have one representative on the Board, and that such representative shall in all cases be elected upon the nomination of the President or Vice-President of the Company holding such stock. In case of a vacancy the Board of Directors shall fill the same at their first subsequent meeting upon the nomination of the President or Vice-President of the Company in whose representation the vacancy occurred.

Fifth.—That there shall be a President, a Vice-President, a Secretary and Treasurer, which two last named offices may be filled by one person, and such other officers and agents as may be from time to time elected by the Board of Directors of the Southeastern and Atlantic Railroad Company.

Sixth.—That the affairs of the Company shall be under the management of the President and Directors, and that the By-Laws of the Company to be adopted by them shall provide for carrying into effect the provisions of this Agreement.

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Seventh.—That the Southeastern and Atlantic Railroad Company is to forthwith commence and is to complete as soon as practicable a Belt Line Railway from the point of connection of the New York, Philadelphia and Norfolk Railroad Company's terminal tracks with the tracks of the Norfolk and Carolina Railroad Company at Pinner's Point, Virginia, to a connection with the track of the Norfolk & Western Railway Company in Berkley, crossing and connecting with the tracks of the Seaboard and Roanoke Railroad Company, the Atlantic & Danville Railway Company and the Norfolk & Southern Railroad Company, and crossing the Southern branch of the Elizabeth River by a suitable bridge.

Eighth.—That to provide for the construction of the said Belt Line Railway, and for the future purposes of the Company, the Southeastern and Atlantic Railroad Company is to make a mortgage to secure an issue of forty year five per cent Gold Bonds, limited in the aggregate to Four Hundred Thousand Dollars, in denominations of One Thousand Dollars each, and that the said Company shall have the right to issue so many of such bonds as may be necessary for the construction and equipment of its railroad including right-of-way, roadbed, superstructures and bridges, not to exceed Two Hundred and Fifty Thousand Dollars, as the same may be required, but the remaining One Hundred and Fifty Thousand Dollars shall be issued under the direction of the Board of Directors only when necessary to provide in part the funds required for the acquisition of property and for additional construction and equipment purposes, and then to the extent only of seventy-five per cent of such expenditures, the remaining twenty-five per cent to be provided by the issue of additional Capital Stock, or otherwise as may be provided by the Board of Directors.

Ninth.—That a uniform rate shall be fixed for the movement of freight cars over the said Southeastern and At-

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lantic Railroad Company's railroad, regardless of distance, and that the rate per loaded freight car shall be so adjusted from time to time as to yield a net revenue sufficient to pay the interest upon the bonds outstanding and a dividend of six per cent on the stock. In case arrangements shall hereafter be perfected for the handling of passenger traffic by the Belt Line the net revenues derived therefrom shall be divided equally among the lines, owners of the stock, as an extra dividend, quarterly semi-annually or annually, as the Directors may determine, it being understood that if the net revenue from the passenger business shall be sufficient to pay extra annual dividends of more than six per cent, then the Directors may reduce the rate per loaded freight car sufficiently to absorb such excess.

Tenth.—That the Companies hereinbefore named, parties to this agreement, will co-operate cordially in encouraging the business of the Southeastern and Atlantic Railroad Company, for which it is constructed, and that each of them will deliver to the said Company all cars to be interchanged with other Companies hereinbefore named, parties hereto, except where there are physical connections already existing.

Eleventh.—That each and all of the aforesaid Companies, parties hereto, are to make the rates of freight in full car load lots between points on the said Southeastern and Atlantic Railroad to points on or that can be reached by their respective lines, in both directions, no higher than those between Norfolk or Portsmouth and such points.

Twelfth.—That no one of the aforesaid Companies, parties hereto, will sell its stock in the Southeastern and Atlantic Railroad Company to any other person, persons, corporation or corporations, until it shall first have given to the other owners of the stock in said Company the

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right to purchase the same in an amount *pro rata* to the amount held by each of them, and at a price not to exceed what may be offered by others, and that to accomplish this notice shall be given by any such stockholder which may desire to sell its interest, to the President and Directors of the Southeastern and Atlantic Railroad Company of its desire to sell, and that the stockholders in said Southeastern and Atlantic Railroad Company shall have at least thirty days from the delivery of such notice within which to purchase the same under the terms above set forth, and that the certificates of stock to be issued by the Southeastern and Atlantic Railroad Company shall provide that the same are not transferable except upon the conditions stated above.

Thirteenth.—That any and all vacancies that may occur in the Board of Directors shall be promptly filled, at once if nomination can be made and the Board be in session, and if not then at the succeeding meeting of the Board, such vacancies to be filled by the election of the nominee of the President or Vice-President of the Company whose representation may be vacant, and that such election shall take place when such nomination has been or may be made before any other business shall be transacted at the said meeting.

Fourteenth.—That none of the Companies, parties hereto, shall be in any way liable for any of the debts, obligations or liabilities of the said Southeastern and Atlantic Railroad Company beyond the amount of their subscriptions to its Capital Stock.

Fifteenth.—It is understood and agreed that the locomotives owned by the parties hereto are not to enter upon or use the tracks of the Southeastern and Atlantic Railroad Company for any purpose whatever, excepting under such rules and regulations as may be established by the Board of Directors of the Southeastern and At-

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lantic Railroad Company by a vote of a majority of all the members of said Board, the intent being that the Southeastern and Atlantic Railroad Company shall perform the service for which it was built and said Company be directly responsible for the competent and efficient discharge of its every obligation to the parties hereto.

Sixteenth.—No other Railroad Company shall be admitted as a stockholder of the Southeastern and Atlantic Railroad Company excepting with the consent of a majority of all of the members of the Board of Directors.

Seventeenth.—That each of the Companies parties hereto, agrees that the Director named by each to represent it in the Board of the Southeastern and Atlantic Railroad Company shall and will vote for such resolutions, by-laws or other proceedings as may be necessary to carry into effect the agreements herein made.

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In Witness Whereof the several Companies above named have each caused this agreement to be signed by its President, Vice-President or General Manager.

THE CHESAPEAKE & OHIO Rwy. Co.

By

DECATUR AXTELL,
and Vice-President.

THE ATLANTIC & DANVILLE Ry. Co.

By

CHAS. O. HAINES,
Gen. Manager.

THE NORFOLK & SOUTHERN R. R. Co.

By

W. B. DICKERMAN,
President.

THE NORFOLK & CAROLINA R. R. Co.

By

W. G. ELLIOTT,
President.

THE NEW YORK, PHILA. & NORFOLK R. R. Co.

By

A. J. CASSATT,
President.

THE NORFOLK & WESTERN Rwy. Co.

By

HENRY FINK,
President.

SOUTHERN RAILWAY COMPANY,

By

A. B. ANDREWS,
1st Vice-President.

SEABOARD AND ROANOKE R. R. Co.

By

R. C. HOFFMAN,
President.

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EXHIBIT B

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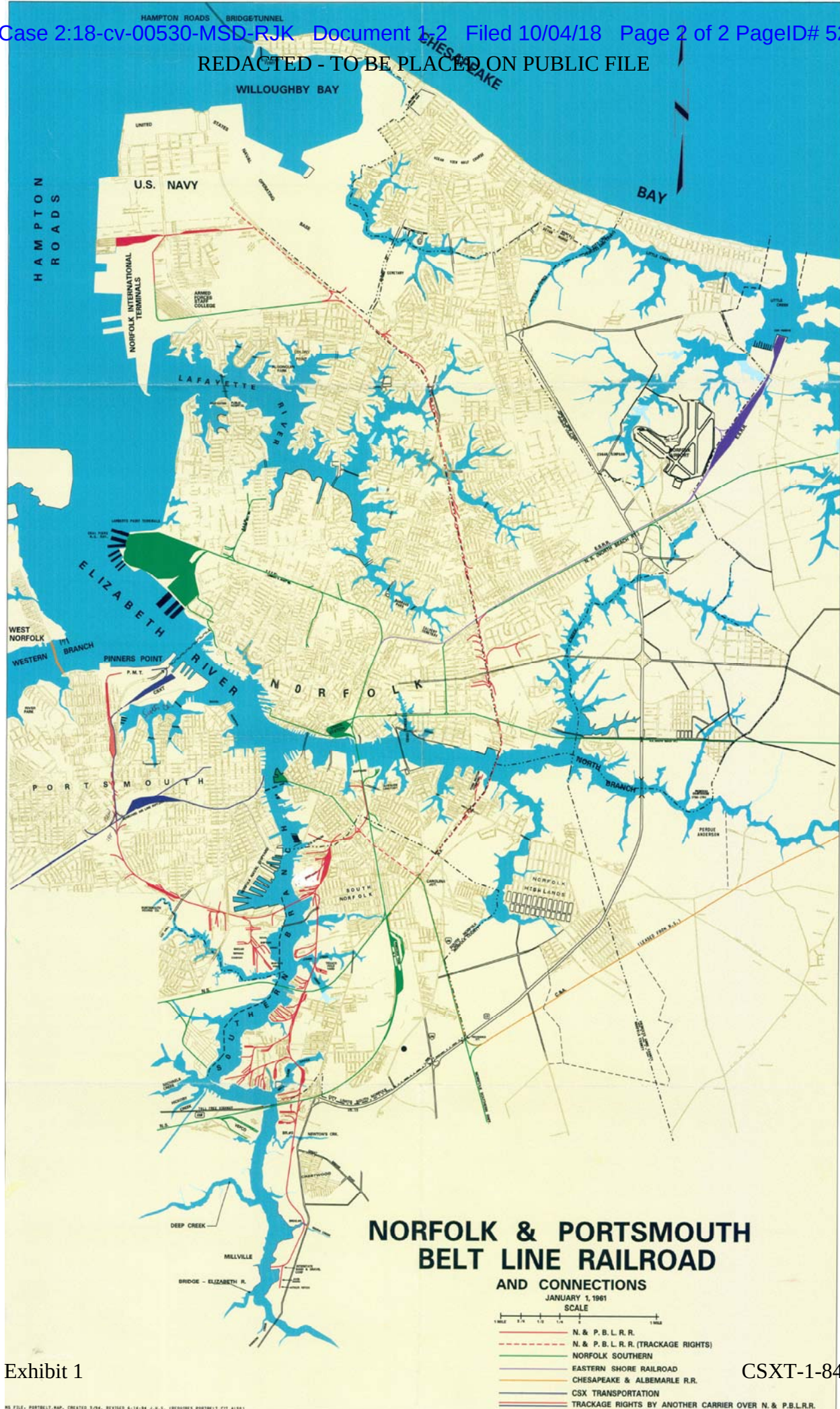


Exhibit 1

CSXT-1-84

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EXHIBIT C

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Dated: March 1, 1989

NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY

NPBL not made a party to this
Agreement - Copy of Supplemental
Agreement between Proprietary Companies
of the Belt Line) AS INFORMATION

AMONG

CSX TRANSPORTATION

and

NORFOLK AND WESTERN

and

SOUTHERN RAILWAY

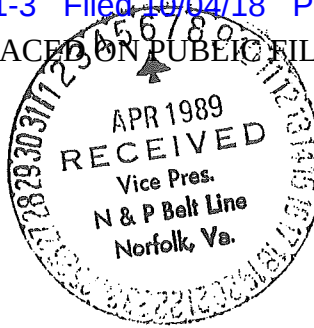
Copy of Supplemental Agreement
between Proprietary Companies, relating
to the NPBL Operating Agreement No. 1,
dated July 7, 1897, and No. 267 dated
February 1, 1924.



**NORFOLK
SOUTHERN**

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

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Writer's Direct Dial Number

(804) 629-2818

Norfolk, VA - April 5, 1989

Mr. J. M. Donnelly
Vice President, Secretary and Comptroller
Norfolk and Portsmouth Belt Line Railroad Company
P. O. Box 3669
Norfolk, VA 23514

Dear Mr. Donnelly:

Enclosed for your information is a copy of the Supplemental Agreement dated March 1, 1989, among CSXT, Norfolk and Western, and Southern Railway, relating to the NPBL operating agreement dated July 7, 1897. The parties have agreed that, notwithstanding Article Fourth of the 1897 agreement, CSXT will continue to have the right to appoint two representatives to the NPBL Board of Directors, and NW and Southern will have the right to appoint a total of three representatives.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Gary Lane".

J. Gary Lane
General Attorney

Enclosure

CC L.W. FISHER

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SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, dated as of March 1, 1989, is between CSX TRANSPORTATION, INC., a Virginia corporation ("CSX"), NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation ("NW"), and SOUTHERN RAILWAY COMPANY, a Virginia corporation ("SR").

WITNESSETH:

WHEREAS, CSX owns 216 shares of the common stock of Norfolk and Portsmouth Belt Line Railroad Company, a Virginia corporation ("NPBL");

WHEREAS, NW and SR each owns 144 shares of the common stock of NPBL;

WHEREAS, CSX, on the one hand, and NW and SR, on the other hand (NW and SR together being hereinafter referred to as "NW/SR"), are successors in interest to railroad companies that were parties to an Agreement dated July 7, 1897 (the "NPBL Agreement"), relating to the ownership and operation of NPBL;

WHEREAS, Article Fourth of the NPBL Agreement provides that the number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in NPBL;

WHEREAS, as of the date hereof, two of the directors of NPBL are representatives of CSX and three of the directors are representatives of NW/SR, and the parties hereto desire to retain such representation on the board of directors of NPBL ("NPBL Board") notwithstanding the provisions of Article Fourth of the NPBL Agreement;

NOW, THEREFORE, the parties hereto agree as follows:

1. Notwithstanding the first sentence of Article Fourth of the NPBL Agreement, CSX shall have the right to appoint two representatives to the NPBL Board, and NW/SR shall have the right to appoint three representatives to the NPBL Board.

2. Nothing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement.

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IN WITNESS WHEREOF, the parties have caused this Supplemental Agreement to be executed by their duly authorized officers.

CSX TRANSPORTATION, INC.

By: 
~~Vice President~~ Treasurer

NORFOLK AND WESTERN RAILWAY COMPANY

By: 
Vice President

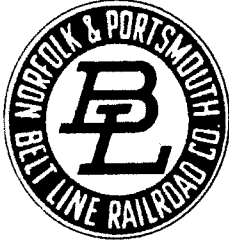
SOUTHERN RAILWAY COMPANY

By: 
Vice President

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EXHIBIT D

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BY-LAWS

OF THE

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

AMENDED APRIL 10, 1996

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B Y - L A W S

of the

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

ARTICLE FIRST

The principal office of the Company shall be in the City of Portsmouth, Virginia.

ARTICLE SECOND

The annual meeting of the Stockholders for election of Directors and for the transaction of such other business as may come before the meeting shall be held on the second Wednesday of April in each year hereafter.

Special meetings of the Stockholders shall be held whenever called by the President, the Board of Directors or the holders of not less than one-tenth of all the shares of stock entitled to vote at the meeting, as provided in §13.1-25 of the Code of Virginia of 1950 as amended. All meetings of the Stockholders shall be held at the office of the Company in Portsmouth, Virginia or at such place as may be designated by the Board of Directors or by the party or parties who may call a special meeting as hereinabove provided.

Notice of annual and special meetings of the Stockholders shall be given in the manner provided by the laws of the State of Virginia.

At any meeting of the Stockholders each shareholder shall be entitled to one vote for each share of stock standing in its name on the books of the Company and may cast such vote in person or by proxy.

ARTICLE THIRD

The Board of Directors shall consist of six voting members and one non-voting member who shall be elected by the Stockholders at this meeting and at all annual meetings thereafter.

Any vacancy occurring in the Board of Directors between elections of the Stockholders shall be filled by the remaining voting members of the Board at their first meeting after the vacancy shall have occurred.

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Meetings of the Board of Directors shall be called by the Secretary, on order of the President, or at the request, in writing, of two or more voting members of the Board.

Four voting members of the Board of Directors shall constitute a quorum for the transaction of business.

The Directors shall continue in office until their successors have been elected and duly qualify.

The President of the Company shall preside at meetings of the Board of Directors and in his absence the Directors shall elect a President pro tem.

ARTICLE FOURTH

At their first meeting after their election by the Stockholders, the Board of Directors shall elect from their own number a President and General Manager and shall appoint a Vice-President, a Secretary and Comptroller and a Treasurer. The Board may then, or at any time, appoint an Assistant Secretary and an Assistant Treasurer, and such subordinate officers as they see fit. All the said officers shall hold their offices during the pleasure of the Board.

ARTICLE FIFTH

The President shall have the general supervision and direction of all the Company's activities, preside at all meetings of the Stockholders or Directors and perform such acts in the name of the Company as he may be authorized by the Directors to do and such other duties as generally are discharged by a President.

ARTICLE SIXTH

The Vice-President shall act for the President in his absence and perform such other duties as may from time to time be assigned by the President or Directors.

ARTICLE SEVENTH

The Secretary and Comptroller shall be present at the meetings of the Board of Directors and shall keep the minutes of the same. He shall keep the stock and transfer ledgers and issue new certificates of stock.

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He shall also be the custodian of the corporate seal of the Company, and shall perform all such other duties as appertain to the office of Secretary. He shall have charge of the general accounting records of the Company and shall audit the accounts of the Treasurer monthly. He shall see that all accounts of the Company are promptly settled and shall perform such other duties as appertain to the office of Comptroller.

ARTICLE EIGHTH

The Treasurer shall be the custodian of all moneys and securities of the Company. He shall keep accurate accounts of all receipts and disbursements and his books shall at all times be open to the inspection of Directors, the President, the Vice President and the Secretary and Comptroller. Before entering upon the duties of his office the Treasurer shall give a bond in the sum of \$25,000, with sureties to be approved by the Board of Directors, for the faithful discharge of his duties. Said bonds shall be filed with the President.

ARTICLE NINTH

All agents of the Company who may receive or disburse moneys on account of the Company shall give bonds, to be approved by the Board of Directors, in such sums as may be required by the Board of Directors, and all such bonds shall, when approved, be filed with the President.

ARTICLE TENTH

All deeds, bonds, mortgages, and other instruments required to be under the seal of the Company shall be executed by the President, or Vice-President, in the name of the Company, and attested by the Secretary, and have the seal of the Company affixed.

ARTICLE ELEVENTH

The Capital Stock of the Company is transferable only on the books of the Company in person or by attorney upon surrender of certificate, and no transfer of the same shall be made to any other person or persons, corporation or corporations until the other owners of the stock shall have first been given the right to purchase the same in an amount pro rata to the amount of stock held by each, and at a price not to exceed what may be offered by others. Notice shall be given to the President and Board of Directors of this Company of the desire of any shareholder to sell its stock, the remaining stockholders to have thirty (30) days from the delivery of such notice within which to purchase the same under the terms set forth. The certificates of stock to be issued by the Company shall provide that the same are transferable only upon these conditions.

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- 4 -

ARTICLE TWELFTH

No other locomotives than those of the Company shall be allowed to use its tracks, excepting under such rules and regulations as may be established by the President, and the President shall immediately report to each member of the Board any consent that may be given by him under this by-law for the use of the tracks by other locomotives, and any such arrangement shall be subject to confirmation or rejection by the Board at any subsequent meeting.

ARTICLE THIRTEENTH

These by-laws may be amended at any annual meeting of the Stockholders or at any special meeting of the Stockholders called for the purpose.

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Original By-Laws adopted by Stockholders July 28, 1897.

Amendments made as follows:

ARTICLE FIRST: April 8, 1987

ARTICLE SECOND: April 2, 1930
 April 7, 1938
 April 8, 1959
 April 11, 1973
 April 10, 1996

ARTICLE THIRD: April 7, 1911
 April 8, 1942
 April 10, 1946
 April 13, 1960
 April 10, 1968
 April 10, 1974
 April 12, 1978
 April 11, 1979
 April 8, 1981
 April 8, 1987
 April 10, 1996

ARTICLE FOURTH: April 8, 1942
 April 10, 1946
 April 13, 1960
 April 12, 1972

ARTICLE FIFTH: April 4, 1917
 April 3, 1929
 April 8, 1942
 April 14, 1943

Repealed April 13, 1949

New Article Fifth adopted April 13, 1960

ARTICLE SIXTH: April 8, 1942
 April 13, 1960

ARTICLE SEVENTH: April 13, 1960
 April 12, 1972

ARTICLE EIGHTH: April 13, 1960
 April 12, 1972

ARTICLE NINTH: April 13, 1960

ARTICLE THIRTEENTH: April 8, 1959

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EXHIBIT E

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CSX Transportation, Inc.
500 Water Street, J-801
Jacksonville, Florida 32202
Tel. 904-359-7637
Email: Tony_DiDeo@csx.com

Tony DiDeo
Director Intercarrier Management
Joint Facilities

March 23, 2018

VIA OVERNIGHT MAIL AND ELECTRONIC MAIL

Mr. Cannon Moss
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Re: Rate Proposal for Long Term Rail Service to NIT

Dear Sir and Madam:

By this letter, CSX Transportation (CSXT) requests that NPBL management adopt the following proposal for long term rail intermodal service to Norfolk International Terminals (NIT), as described in detail below, and as consistent with the NPBL's purpose and interests.

A few years ago, NPBL handled several intermodal trains during a period of near historical shipping container congestion at the ports in Virginia and along the east coast. From those movements alone, we confirmed that consistently operating trains to NIT for CSXT is possible. During that short-lived crunch, CSXT was able to justify the extremely high cost of moving those trains via NPBL at its general tariff rate only because the Virginia Port Authority (VPA) and our customers were desperate to clear the backlog caused by the

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unexpected container surge, and our drayage providers were completely overwhelmed. In other words, we had no other practical choice at the time.

The NPBL's general tariff rate, however, remains prohibitive for normal movements of shipping containers to and from NIT. NPBL has not handled a single intermodal train for CSXT since that period of extreme congestion (nor did it move any intermodal trains to NIT for CSXT prior to that time). This is principally because NPBL's unduly high rates, as well as operational constraints on its service to NIT that should not have existed, and in all events are avoidable or remediable, have made use of NPBL to move containers to or from NIT economically non-viable, or even effectively impossible.

We have been studying this issue closely, however, and remain confident that a rate package promptly can be negotiated and agreed to that would provide the NPBL with a consistent, long term stream of additional income that could improve its financial position and sustain it into the future, while also being sufficiently reasonable that NPBL could attract sufficient additional traffic to support the rates profitably. In fact, we estimate the service for CSXT we are proposing will generate for NPBL approximately \$1,440,000 in incremental revenue and potentially \$660,000 in incremental operating income in the first year of service alone (estimates based on NPBL's 2016 Annual Report).

The following is a proposal of terms which can serve as the foundation for a definitive rail transportation agreement. We are open to discussion on all points, and welcome your input throughout the process, though we want to move this to conclusion swiftly and see no reason it cannot be.

Background

On July 19, 2010, CSXT provided NPBL management with a formal rate proposal and operating plan (enclosed), which was the product of months of review with NPBL management and Virginia International Terminals (VIT). In particular, NPBL management provided financial and costing information that allowed CSXT to tailor its proposal in a manner that would have provided consistent additional operating income to the NPBL and would have been mutually beneficial for NPBL and CSXT. We expect much of the work and learning from that extensive review process is still relevant and useable, and can be replicated or updated to expedite development of a new mutually-beneficial arrangement. Similarly, we believe the commercial sensitivity and depth of historical information on hand would obviate the need for convening another rate committee, but we are willing to work again through this approach if necessary.

With respect to the operating plan, we are pleased to report that senior officers of CSXT have already met with VPA officers to discuss our objective. The VPA was very supportive of our plans and have committed to assisting us with this important endeavor. Thus, much like the rate committee, we expect any discussions with VIT regarding operations will be productive and can be arranged in short order.

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Summary of Proposed Rates and Contractual Terms

The past two decades have demonstrated that the NPBL general tariff charge of \$210 per car (or per unit, in the case of articulated cars) remains an economic barrier for the NPBL to handle intermodal freight. This charge, whether absorbed by CSXT or passed through to the customer, is simply not competitive for any lane on our network and beyond. Although the NPBL's tariff history demonstrates that the NPBL has often published different switch charges for different commodities, we are aware of NPBL managements' past statements that it was not willing to offer different rates based on commodities. Similarly, we understand the NPBL has faced challenges from its Board and/or the other shareholder with respect to private contracts. More specifically, some Board members in the past have argued that an amendment to the NPBL bylaws would be required to permit the NPBL to enter into private freight contracts (even though the NPBL enters into private contracts for other services, such as locomotive leases, contractor services, etc.), and to allow use of non-NPBL owned or leased locomotives for movements over NPBL trackage. After reviewing case law and Virginia code extensively, we are not convinced this is an accurate interpretation of NPBL's bylaws or the law, generally. Nevertheless, we believe that we will be able to reach agreement on a long term transportation agreement that will be sufficiently beneficial to NPBL such that no reasonable person could refuse to take whatever action is necessary to allow NPBL to enter into such a contract, even if it would involve using locomotive power provided by CSXT or another company. By doing so, we might also be able to lay the groundwork for similar rates and services to be provided by NPBL for NS to reach Portsmouth Marine Terminal (PMT) going forward.

Even at an income-neutral level, we think aspects of how the NPBL operates need to be updated for it to remain viable and competitive, and able to fulfill its charter. Port traffic in Norfolk and Portsmouth is continuing to increase, and NIT is undergoing a radical expansion thanks in large part to a capital infusion of hundreds of millions of taxpayer dollars. If ever there was a time to demonstrate the NPBL's commitment to serve its shareholders and the community that supports it financially, and provide intermodal service to NIT, it is now. Failure to seize this opportunity virtually begs VPA to configure NIT in a manner that would effectively preclude NPBL from continuing to provide even nominal rail service to NIT.

Rate:

We propose \$80 per car (i.e., each articulated section of an articulated car), for loaded or empty cars, moved to or from NIT for the purpose of handling international containers. We think this rate will be sufficiently competitive to attract incremental rail intermodal freight to NIT, while allowing NPBL to earn additional revenue of \$1,440,000, annually, based on the initial level of volume we describe below.

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Volume:

CSXT proposes a minimum annual volume guarantee, with mutually agreed conditions, of moving 18,000 cars (i.e., each articulated section), loaded or empty, moving to or from NIT, on the NPBL per contract year. We are open to a gradual ramp up of volumes in the first years, to allow for less volume in the initial years, progressing (or even exceeding) the proposed volumes in this proposal letter. Finally, we are willing to negotiate mutually-suitable minimum and/or maximum train sizes (on a per car basis).

Shortfall Fee:

CSXT proposes a shortfall fee of \$60 per car, based on a minimum volume commitment of 18,000 cars per year. Standard defenses or exceptions (e.g., force majeure) would apply.

Days of Service:

We have modeled our proposal based on 5 days per week service, consistent with the days of operation at NIT, in order to take advantage of the efficiency and safety benefits provided by fixed crew assignments. Over time, we would be interested in up to 7 days per week service (with a corresponding increase in guaranteed minimum volume), and are willing to consider a graduated “ramp up” to 7 days in the earlier stages of this service. We understand we will both need to consider labor costs, among other things, and are willing to work with you to maximize productivity.

Start Date and Term:

CSXT is ready, willing and able to commence service today. That said, we would be open to a commencement date within 30 days of the execution and delivery of the mutually agreed contract. With respect to the term of any agreement, CSXT is willing to negotiate a reasonable fixed term, including conditions for renewal, all to be mutually agreed.

Locomotives and Fuel:

CSXT is willing to provide NPBL with the locomotives and fuel to handle movement of CSXT traffic at no charge to NPBL. We understand there has been an objection to using CSXT power in the past, even though CSXT and NS locomotives operate on NPBL property every day. As noted above, we think we can reach a mutually agreed arrangement that is sufficiently attractive to motivate appropriate corporate action (if any is necessary) to remove any obstacles. Nevertheless, we are also willing to work with NPBL to adjust the

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rates and operating plan to account for use of NPBL power and fuel, at least to the extent and for so long as any corporate formality actually requires NPBL to do so.

Regardless of which locomotives are used for the move, we would defer to NPBL's stated preference or requirements with respect to the minimum locomotive power (i.e., Horsepower per Ton Ratio).

Interchange Location, Time of Handoff, and Maximum Train Length:

Here again, we would defer to the NPBL with respect to the interchange location, and are open to designation of multiple interchange locations (e.g., Berkley Yard and Portsmouth Yard) to be determined by the parties prior to each interchange event. Rates would remain the same, regardless of interchange location. Similarly, we are willing to work with you to determine operating windows for the exchange of interchange cars. We understand that, at least initially, the windows may vary on a weekly (if not daily) basis.

Documentation:

The foregoing terms would be subject to and become binding only upon memorialization in a mutually agreed written format (rail transportation contract or equivalent) duly signed for both NPBL and CSXT.

Economic Impact on the NPBL

Based on CSXT's internal projections of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost to NPBL, we estimate this proposal would provide the NPBL with a minimum of \$660,000 of additional annual operating income (and an operating ratio for the service equal to 54%) starting in the first full year of operations. That would represent a substantial increase over 2016 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment from CSXT to move 18,000 cars per year. Given the estimated operating ratio NPBL would enjoy from this service, and CSXT's expectation that volumes will only grow once the parties can demonstrate consistent service, we believe this proposal could be a significant element of NPBL's long term strategy in Norfolk.

Operating Plan

The requested services is for "drop and swap" intermodal single-stack or double-stack unit train service between Berkley Yard (or Portsmouth Yard) and NIT. We intend to

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work with you to minimize direct expenses to the NPBL, to work with VIT to integrate with existing and planned operations inside the gate at NIT. We also recognize the need to work with NS to integrate with their operating needs, and we believe it is imperative for all parties to work together in order for NPBL to honor its longstanding obligation to provide service to its owners, to enjoy the use of its trackage rights, and to fulfill the purpose of its retained trackage rights from the sale of its property outside of NIT to the VPA in 2010.

We also note that the NPBL management endorsed the operating plan detailed in the July 19, 2010 rate proposal, and we are willing to work from that operating plan with such adjustments as may be deemed necessary to address any bona fide concerns raised by NS or VIT.

Summary

During the eight years since CSXT's last proposal for long term rail intermodal service, CSXT has had no choice but to dray over one hundred thousand containers that easily could have been handled by the NPBL. Under the current proposal, and based solely on a minimum volume, the NPBL could earn at least \$11 million in revenue and over \$5 million in incremental operating income over the same period. As NIT continues work on its massive expansion project, nearly doubling its present throughput, the projected earnings from this proposal could increase tremendously.

As stated above, we are fully committed to work with the NPBL to address any concerns regarding the requested service and any other terms of this proposal. Given the opportunity presented by this proposal, and the downside if we must continue to rely on drayage, there can be no doubt that time is of the essence for both parties. To that end, we respectfully request a written response to this proposal no later than **April 2nd**.

We look forward to working with you on this important project.

Sincerely,



Tony DiDeo

(Enclosure – July 19, 2010 Rate Proposal and Operating/Financial Plan)

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July 19, 2010 Rate Proposal & Operating/Financial Plan

[Please see attached]

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500 Water Street, J315
Jacksonville, FL 32202
(904) 359-3486
John_Booth@csx.com

J.N. Booth, III
Director Joint Facilities

July 19, 2010

VIA ELECTRONIC MAIL

Mr. David Stinson
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Re: **Rail Service Connection to NIT – Rate Proposal and Operating/Financial Plan**

Dear Sir and Madam:

We refer to CSXT's October 15, 2009 rate proposal, which was rejected by the NPBL because it did not include a detailed operating plan and estimated financial impact on the NPBL. To address the NPBL's concerns, CSXT has consulted with the NPBL and Virginia International Terminals, Inc. (VIT) on the following operating plan, and has further examined relevant financial information, including information provided to the 2009 NPBL Rate Committee.

CSXT is now pleased to offer the following rate proposal, together with an operating plan and related financial information. As detailed below, and assuming NPBL elects to use CSXT locomotives at no charge, this rate proposal will provide the NPBL with at least \$149,452 in risk-free incremental operating income in the first calendar year of operations alone.

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Operating Plan

This operating plan is for intermodal single-stack unit train service between Berkley Yard and Norfolk International Terminals (NIT). In addition to minimizing direct expenses to the NPBL, this operating plan is designed to integrate with existing and planned operations inside the gate at NIT.

At the onset, CSXT requests a drop & swap service three days per week; whereby the NPBL would complete services at NIT between 00:00 and 05:00 on Sunday, Tuesday, and Thursday. For your convenience, Annex A to this letter proposal provides a visual overview of the rail movements in the operating plan described below:

- First, CSXT will deliver a locomotive, including sufficient fuel for the round-trip to NIT, and cars to Berkley Yard, by 18:00 on the preceding day.
- Between 18:00 and 21:00 on the days of CSXT's delivery to Berkley Yard, the NPBL will access NSRR tracks starting at NS Jct., as permitted by agreements between NPBL, NSRR and their respective predecessors dated: July 26, 1917, July 27, 1917, December 31, 1985 and January 1, 2008.
- At Port Lock Yard, the NPBL will pull into an available track, as designated by the NSRR Yard Master. At this time, the NPBL crew will cut away from the front of this consist, run around to the tail, and reconnect. NPBL will perform required brake testing prior to departing. At this point, the NPBL will be staged and waiting for the NSRR Yardmaster to grant permission for movement to NIT.
- After departure from Port Lock Yard, the NPBL will arrive at NIT during the scheduled window from 00:00 to 05:00. As the NPBL advances the 8 miles to QM Jct. (crossing the right leg of the switch), it will proceed past West Jct. onto the NPBL trackage, known as Sewells Point Yard. Here, the crew will set off the consist onto the passing track near Hampton Blvd. and North Gate Road.
- The NPBL crew will then contact VIT for instructions relative to any outbound CSXT containers to be pulled from NIT.
 - If there is an outbound consist to be picked up at NIT, the NPBL crew will advance to NIT and retrieve the consist from the pickup track designated by VIT.
 - The consist will already have been inspected and air tested by TTX, at no cost to the NPBL.
 - The NPBL crew will backtrack over the same route returning to Berkley Yard for CSXT pick up between 13:00 and 17:00 same day.
 - If there is no outbound consist to be picked up at NIT, the NPBL crew would return the locomotive to Berkley during that same window.

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Please note the following, which was incorporated into this operating plan:

- The NPBL management has expressed confidence that the proposed round-trip schedule can be completed efficiently with one scheduled crew start.
- This operating plan assumes the NPBL will use CSXT's locomotive between Berkley and NIT without cost or requirement to refuel.
 - This accommodation will not only simplify operations for these moves, it will enhance NPBL's profitability as noted in the first table below. If NPBL elects to use its own power, the calculations shown in Table 2 will apply.

Rates and Contractual Terms

In order for the NPBL to secure port-related traffic at NIT, its rates and operating requirements must be competitive. Presently, the NPBL's switch rate of \$ 210 per car is an economic barrier that prevents CSXT from being able to move any meaningful port freight by rail at NIT.

Here's why: under Item 125 of its public tariff, the Commonwealth Railway charges \$35.61 per container (empty or loaded) for a similar movement from APM Terminals. The difference between switch charges is considerable, and will only make the NPBL's rate less competitive now that VIT can shift traffic to APM Terminals in its discretion.

CSXT is not interested in placing the full burden on the NPBL to close this gap. Our proposed operating plan, which provides substantial risk-free incremental operating income, demonstrates our willingness to make accommodations to help the NPBL in this effort.

Accordingly, CSXT proposes the following, all to be memorialized in a formal agreement:

- One-way rate of \$37.50 per container (empty or loaded) for a term of three years on movements handled by the NPBL between Berkley Yard and NIT. For operational convenience as necessary, the parties may mutually agree to interchange at Portsmouth Yard for the same rate.
- To minimize financial risk to the NPBL, CSXT commits to provide a minimum average volume (measured over each six month period during the term) of 50 containers per scheduled NPBL round-trip. Assuming three days per week service, the NPBL would have a consistent revenue stream of \$146,250 for 3,900 containers for that six month period.
- In consideration of CSXT's commitment, CSXT may request that scheduled service days be adjusted upon CSXT's prior written request. Also upon prior written request, CSXT may request double-stack service at the same rate per container.

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These adjustments, with allowance for proper notice, would give both parties adequate time to respond to changing market conditions.

- The NPBL's standard settlement and credit terms would apply to the covered traffic, with any potential container shortfall payment to be remitted in a reasonable time after each six month period.
- Mutually acceptable measures and standards of service, including incentives related thereto, would be incorporated into a formal agreement.

Economic Impact on the NPBL

As shown below in Table 1, based on CSXT's internal analysis of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost, this proposal would provide the NPBL with a minimum of \$149,452 of additional annual operating income starting in the first full year of operations. That would represent an increase of 25% over 2009 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment of 50 containers. For example, if CSXT tenders 80 containers per round-trip (the "Project Volume"), the NPBL's incremental operating income would be \$296,872 over the first full year of operations. This modest increase in volume is not an unreasonable projection, and yet it would represent almost a 50% increase to 2009 operating income.

[TABLES FOLLOW ON NEXT PAGE]

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Table 1

	W/ CSXT Locomotives & Fuel	
	<u>Base Level</u>	<u>CSXT Projected</u>
Avg. Containers Per Train (Scheduled Crew)	50	80
<u>Annual</u>		
Container Volume	7,800	12,480~
NPBL Revenue	\$292,500	\$468,000
Compensation & Benefits	\$96,248	\$96,248
Locomotive Expense	\$0	\$0
Fuel	\$0	\$0
Incremental Maintenance	\$46,800	\$74,880
Direct Expense*	\$143,048	\$171,128
Operating Income Impact	\$149,452	\$296,872
* Extrapolated from 2009 Rate Committee Meeting Package		

Table 2

	W/ NPBL Locomotives & Fuel	
	<u>Base Level</u>	<u>CSXT Projected</u>
Avg. Containers Per Train (Scheduled Crew)	50	80
<u>Annual</u>		
Container Volume	7,800	12,480
NPBL Revenue	\$292,500	\$468,000
Compensation & Benefits	\$96,248	\$96,248
Locomotive Expense	\$10,714	\$10,714
Fuel	\$19,000	\$19,000
Incremental Maintenance	\$46,800	\$74,880
Direct Expense*	\$172,762	\$200,842
Operating Income Impact	\$119,738	\$267,158
* Extrapolated from 2009 Rate Committee Meeting Package		

Note to Table 2: As noted above, CSXT's operating and financial plan contemplates the NPBL's use of CSXT locomotives and fuel at no charge. However, should the NPBL wish to use its own locomotives and fuel, Table 2 provides an estimate of the economic impact to the NPBL, which remains quite favorable.

If the NPBL elects not to use CSXT's locomotives and fuel, the NPBL would still make \$119,738 in incremental operating income at the base-line volume commitment level in the first year of operations. And, using the Projected Volume, the NPBL would generate \$267,158 of incremental operating income, which would represent an increase of approximately 45% over 2009 total operating income for the NPBL.

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Summary

CSXT reaffirms its belief that time is of the essence for the NPBL to consider this proposal, which is designed to enable both parties to attract intermodal port traffic at NIT. The outlined operating plan and projected financial gains respond to the NPBL's earlier concerns and provide the justification necessary for the NPBL management to support this endeavor.

CSXT also believes this proposal enables the NPBL to deliver on the commitments it has made, directly and indirectly, to the citizens of the Commonwealth, to create competitive dual rail service at NIT. We hope you agree and respectfully request a favorable response from you within thirty (30) days of this letter.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "John W. Booth", with a stylized flourish at the end.

John Booth

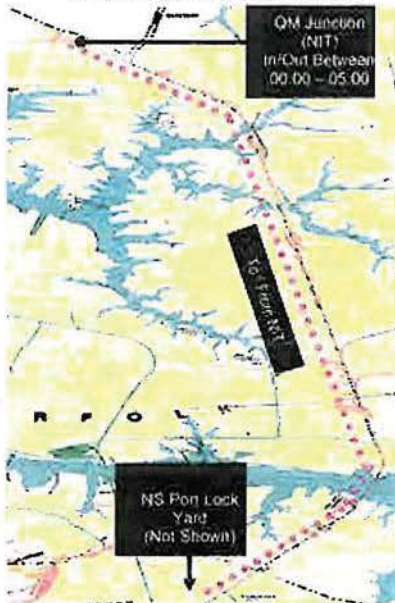
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Operating Plan Support Maps

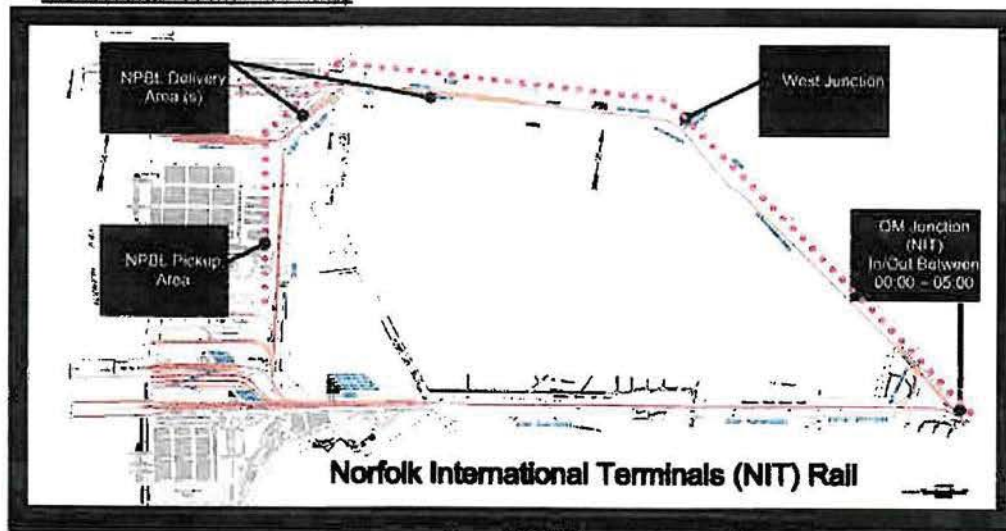
CSXT → Berkley Yard → NSRR Port Lock Yard



NSRR Port Lock Yard → NIT



Norfolk International Terminals



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EXHIBIT F

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Steven C. Armbrust
Assistant General Counsel
Corporate & Transportation Law

Admitted in NY – Not Admitted in FL
FL Authorized House Counsel

April 6, 2018

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

Norfolk & Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Norfolk Southern Railway
Three Commercial Place
Norfolk, VA 23510

Re: Demand that the NBPL Board and Norfolk Southern Railway Take Remedial Actions at April 2018 Meetings of the Board and the NPBL Shareholders

To: Members of the NPBL Board
Norfolk Southern Railway

CSX Transportation, Inc. ("CSXT") demands that the Norfolk & Portsmouth Belt Line Railroad Company ("NPBL"), through its Board of Directors (the "NPBL Board"), and Norfolk Southern Railway ("NS") take remedial actions at the April 2018 meetings of the NPBL Board and the NPBL Shareholders to address serious deficiencies in the policies, procedures, controls, and governance structure of the NPBL. As detailed below, as a direct result of these deficiencies, CSXT has been deprived of its contractual right to equal representation on the NPBL Board, and NS has impermissibly taken, exercised and maintained control of the NPBL, the NPBL Board and management, and the operation of the NPBL's railroad. The need for change has been accentuated by recent events involving NPBL management's response to a new rate and traffic proposal by CSXT.

Accordingly, CSXT demands that the NPBL and NS take all necessary actions to (i) afford CSXT equal representation on the NPBL Board, including limiting the shareholder-designated representatives on the NPBL Board to one director designated by each of NS and

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CSXT as its representative (and with qualified independent directors filling the remaining Board seats); (ii) replace certain NPBL management with qualified individuals who are independent of both NS and CSXT; and (iii) adopt a proper corporate compliance program (including a Code of Ethics) that is prepared and made appropriate for the NPBL and independent of any program or code adopted by and for NS.

CSXT Must be Afforded Equal Representation on the NPBL Board

As you are aware, CSXT and NS (collectively, the “Shareholders”) are the holders of all of the issued and outstanding stock of the NPBL. CSXT and NS also, as successors to the original contracting parties, are the sole remaining parties to that certain Agreement dated July 7, 1897 between and among all of the original shareholders of the NPBL (as amended, the “NPBL Agreement”). The NPBL Agreement relates to and governs the ownership and operation of the NPBL and, *inter alia*, creates and establishes various duties and obligations (a) between and among the Shareholders, and (b) owed by the members of the NPBL Board and management (including its President and General Manager) to each Shareholder.

The NPBL Agreement provides that each Shareholder “shall have one representative on the Board” of the NPBL. Agreement at Art. 4. In a Supplemental Agreement dated as of March 1, 1989 (the “Supplemental Agreement”), the three rail carrier companies that comprised the NPBL’s shareholders at that time -- CSXT, Norfolk and Western Railway Company (“NW”) and Southern Railway Company (“SR”) -- agreed to deviate from Article 4’s requirement that the “number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in the NPBL.” Pursuant to the Supplemental Agreement, and in view of the unique circumstances that then pertained with respect to NW and SR as separate rail carriers and companies with common corporate ownership, CSXT was afforded the right to appoint two representatives to the NPBL Board, and the other two companies, NW and SR, collectively between them were afforded the right to appoint only three representatives to the NPBL Board.

Years later, NW and SR merged to form the single company now known as NS. The merger of those two companies eliminated the purpose for which the Supplemental Agreement had been created and rendered the Supplemental Agreement’s modifications to Article 4 of the NPBL Agreement unwarranted, moot, and contrary to the core organizing principle and intent of the original NPBL shareholders, as set forth in the NPBL Agreement that its railroad “should be constructed, maintained and operated under a separate organization in which all [shareholder companies] are to be equally interested and each to have an equal representation.” Agreement p. 1 [first “WHEREAS” paragraph].

Notwithstanding that NW and SR ceased to exist as separate companies, and only two companies, CSXT and NS, are NPBL’s sole Shareholders at the present time, CSXT has not been afforded equal representation on the NPBL Board or equal interest in the construction, maintenance and operation of the NPBL railroad, in direct contravention of CSXT’s rights under the NPBL Agreement. The NPBL Board currently consists of six voting members and one non-voting member. By-Laws of the NPBL at Art. 3 (1996). NS (through its historic exercise of a greater number of votes as holder of a majority of NPBL’s shares) has designated, voted for and controls five members of the NPBL Board (four voting members and one non-voting position), while allowing CSXT to designate only two members for election to the NPBL Board. All three of NS-designated voting non-management directors are current NS employees; the fourth NS-

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designated director position is held by the individual serving as President and General Manager of the NPBL, who was appointed to that position by the three NS-designated non-management directors (over the objection of the CSXT-designated directors) and is a former NS employee; and the non-voting position, the Vice President, Comptroller and Corporate Secretary, is held by another former NS employee. NS has thereby taken and exercises complete control of the NPBL Board, and the management and operation of the railroad, largely to the exclusion of CSXT and without participation by any independent director or officer.

The NPBL Board and NS must take immediate action to provide CSXT with equal representation in NPBL including, but not limited to, the remedial actions stated herein.

NPBL Management Must be Replaced with Individuals who are Independent

As specified in the NPBL Agreement, the NPBL exists for the *mutual* and *equal* benefit of its shareholders to provide an efficient means of interchanging the traffic of its owners. In order to advance the purpose for which the NPBL was formed, the original shareholder companies, including those whose successors are currently the Shareholders and parties to the NPBL Agreement, expressly agreed therein that it is in the best interest of all shareholders that each shareholder have equal representation in the NPBL, and committed that each shareholder will “co-operate cordially in encouraging the business of the [NPBL] for which it is constructed.” NPBL Agreement at 1. The mission and purpose of the NPBL is to be carried out by the NPBL Board, in connection with the NPBL management, which includes the President and General Manager (who acts as both management and a voting member of the NPBL Board), Vice-President, Secretary and Comptroller and Treasurer.

Pursuant to the NPBL By-laws, the NPBL “Board of Directors shall elect from their own number a President and General Manager and shall appoint a Vice-President, a Secretary and Comptroller and a Treasurer.” By-Laws of the NPBL at Art. 4 (1996). NS has exploited its unequal and improper control of the NPBL Board to appoint and elect an NS-controlled individual to the position of President and General Manager who, in turn, appoints NS-controlled individuals to other NPBL management positions. Indeed, the current NPBL President, Cannon Moss, his immediate successor, President David Stinson, as well as the rest of the NPBL management, are all former employees of NS who act under and at NS’s direction, and each has been reemployed by NS, or expected and/or has been led by NS to believe that they may be employed again by NS in the future. As a result, the NPBL management, including Mr. Moss in his capacity as both NPBL President and General Manager and a director, are beholden to NS and have a vested interest to act in the best interest of NS, as opposed to both Shareholders and the NPBL’s business interests.

Accordingly, the NPBL Board must take immediate action to remedy the conflicts of interests between NS and the NPBL’s management including, but not limited to, the remedial actions stated herein.

NPBL Must Establish a Corporate Compliance Program That Is Independent of NS (and CSXT) and Is Designed for NPBL’s Particular Organization

In 2012, CSXT and NS performed a joint audit of the NPBL to evaluate the effectiveness of the NPBL’s policies, procedures, controls, and governance structure. In the Final Audit

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Report dated November 27, 2012, CSXT and NS identified deficiencies with the NPBL's corporate governance and observed that (1) an NPBL "corporate compliance program does not exist and general operating policies and procedures are not documented," and (2) the NPBL's "contract approval and execution controls are not sufficient." The Final Audit Report states that these deficiencies create substantial (rated as "medium") and "unnecessary" risks and liabilities for "NPBL and its owners", explains those risks in some detail, and states that that the "[a]udit observations will remain open until management's action plans are completed and validated." Final Audit Report at 3.

To remedy these deficiencies, the Final Audit Report contained several recommendations, including that the NPBL: (i) eliminate its reliance on NS's documentation for a compliance program, and policies and procedures; (ii) develop and implement a corporate compliance program appropriate for the company; (iii) develop a Code of Ethics for the NPBL, which is independent of NS's policies and procedures; and (iv) develop a formal process for each of the four types of contracts the NPBL primarily enters into (purchasing, real estate, lease, and right-of-way) that requires approval by more than one officer, as opposed to permitting a single individual to negotiate and execute contracts on the NPBL's behalf.

Despite the findings and recommendations of the audit, the NPBL management, as dominated and controlled by NS, has failed to rectify fully these deficiencies and obtain validation of completion of an effective action plan. The NPBL has also failed to take steps to address other deficiencies in its corporate governance, such as the complete absence of any independent, meaningful periodic review of the performance and compensation of the NPBL President and other members of its management.

Accordingly, the NPBL must take immediate action to remedy these corporate governance deficiencies, including, but not limited to, the remedial actions stated herein.

The deleterious effects of the foregoing are underscored by recent events involving the submission of a new rate and traffic proposal by CSXT. Initially, instead of responding to that commercial proposal, NPBL management deferred a response until after a "discussion" with the board at the next NPBL Board Meeting. When pressed for a response before the board meeting, NPBL management responded with numerous potential—though illusory—impediments to the proposal, as opposed to engaging on the terms towards the end of an agreement acceptable by both parties. This kind of response is inconsistent with an impartial management team whose primary purpose should be the success and growth of the business it is managing. Rather, the NPBL management's refusal to respond constructively to the latest proposal from CSXT follows the same pattern of delay and obstruction that the unchecked, NS-controlled NPBL Board and management has perpetrated for years. This practice not only unreasonably and unlawfully harms CSXT as a Shareholder in the NPBL and a competitor of NS, but also results in the NPBL acting contrary to its own interests.

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Requested Remedial Actions:

CSXT demands that the NPBL Board and NS take any and all actions necessary in advance of, at and following the upcoming annual Shareholder Meeting in April 2018 (the “Shareholders’ Meeting”) and the contemporaneous meeting of the NPBL Board to:

- a. Restructure the NPBL’s governance systems to provide for equal representation of both of the Shareholders on the NPBL Board, and ensure that the NPBL is and remains “constructed, maintained and operated under a separate organization in which all [shareholder companies] are to be equally interested and each to have an equal representation.” Necessary action by the NPBL Board and Shareholders include:
 1. At the Shareholders’ Meeting, voting the Shareholders’ respective shares (i) to elect only one director designated by, respectively, each of NS and CSXT; and (ii) elect as voting directors four disinterested qualified individuals, each of whom is fully independent of both NS and CSXT (each an “Independent Director”). Each Independent Director shall meet the requirements for independence set forth on Exhibit A hereto, which requirements are based on those found in Section 303A.02 of the New York Stock Exchange Listed Company Manual.
 2. At a meeting of the NPBL Board held during a temporary adjournment of the Shareholders’ Meeting, immediately following the election of directors referenced above, the newly-elected directors must then elect and appoint, from among the four Independent Directors, a qualified individual to serve as President and General Manager of NPBL.
 3. To facilitate the effective and fair implementation of items “a.1” and “a.2” above, within five business days of the date of this letter, the NPBL Board should establish a nominating committee to identify and nominate at least four candidates for election as Independent Directors. The nominating committee should be comprised of two current directors of the NPBL (only one of whom may be a director designated by NS and the other a director designated by CSXT), and the nominating committee should be authorized and directed to engage independent professionals as consultants to assist in identifying and qualifying candidates to serve as the four Independent Directors.
 4. One of the Independent Directors identified above should be nominated for election and appointment by the NPBL Board with the expectation that this Independent Director will serve as President and General Manager of the NPBL. If no candidate for Independent Director can be identified who is qualified and willing to serve as President and General Manager by the April meetings, Cannon Moss may be elected to continue serving as a Director and appointed to continue serving as President and General Manager, provided it is understood and agreed (A) he will be continuing to serve in those positions on an interim basis and (B) he (x) promptly upon the approval of a new candidate for President and General Manager by the nominating committee described in “b” below and approved by a majority of the other voting Directors, or (y) immediately if a majority of the other voting Directors, in their sole discretion, conclude that Mr. Moss has taken

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any material action or omitted to act in any way, for NPBL, that reflects a lack of independence from NS, will resign from the positions of Director, and President and General Manager of NPBL.

- b. After establishing the new NPBL Board as provided in “a.1” above, establish (i) a standing nominating committee of the NPBL Board that includes no less than two Independent Directors, and both the CSXT- and the NS-designated Directors if either wants to participate on the committee, but shall not include the President and General Manager if Cannon Moss is then serving in that position; (ii) a policy setting forth the criteria for selection of candidates for the NPBL management positions and Independent Directors, which criteria shall include, without limitation, a requirement that the President and General Manager of the NPBL be selected from among the Independent Directors and must at all times be and remain independent of, and free of conflicts of interest concerning, both of the Shareholders and their respective Affiliates (including, without limitation, that such candidates would qualify as independent under the criteria set forth in Exhibit A); and (iii) a policy setting forth the qualifications and criteria for selection and appointment of the Vice-President, Secretary and Comptroller and Treasurer that would ensure that the individual appointed to and holding that position is independent of, and free of conflicts of interest concerning, both of the Shareholders and their respective Affiliates.
- c. Fully and consistently implement a corporate compliance program appropriate for the NPBL that is independent of NS’s policies and procedures.
- d. Fully and consistently implement formal conflict of interest policies and procedures that are independent of NS’s conflict of interest policies and procedures.
- e. Develop and document a formal process for each of the four types of contracts the NPBL primarily enters into (purchasing, real estate, lease, and right-of-way) that eliminates single contract authorization, and provides for the review and approval of contracts by at least two officers prior to execution.
- f. Establish a committee of Independent Directors charged with, no less than annually, reviewing the performance of the NPBL’s President and General Manager, and all other officers, managers and superintendents, and with reviewing and determining the reasonable compensation for those executive and management employees.

Very truly yours,



Steven Armbrust

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EXHIBIT A

INDEPENDENT DIRECTOR REQUIREMENTS

No person shall serve as an Independent Director of the NPBL if:

(i) The person is, or has been within the last three years, an employee of a Shareholder or a Shareholder's Affiliate (as defined below), or an immediate family member is, or has been within the last three years, an executive officer, of a Shareholder or a Shareholder's Affiliate;

(ii) The person has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from a Shareholder or a Shareholder's Affiliate, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);

(iii) (A) The person is a current partner or employee of a partnership, company or other business organization (a "firm") that is a Shareholder or a Shareholder's Affiliate's internal or external auditor; (B) the person has an immediate family member who is a current partner of such a firm; (C) the person has an immediate family member who is a current employee of such a firm and personally works on a Shareholder or a Shareholder's Affiliate's audit; or (D) the person or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on a Shareholder or a Shareholder's Affiliate's audit within that time;

(iv) The person or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any Shareholder's or Shareholder's Affiliate's present executive officers at the same time serves or served on that company's compensation committee;

(v) The person is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, a Shareholder or a Shareholder's Affiliate for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues; or

(vi) The person otherwise has a material relationship with a Shareholder or a Shareholder's Affiliate (either directly or as a partner, shareholder or officer of an organization that has a relationship with a Shareholder or a Shareholder's Affiliate).

As used herein, the term "Affiliate" means, when used with respect to a specified person or entity, another person or entity that either directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified. For purposes of this definition, "control" (and its derivatives) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person or entity, whether through ownership of equity, voting or other interests, as trustee or executor, by contract or otherwise.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

EXHIBIT 2

DISTRICT COURT LITIGATION

PLAINTIFF CSXT'S CONSOLIDATED OPPOSITION TO
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,
individually and on behalf of NORFOLK
& PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Plaintiff,

v.

Civil Action No. 2:18-cv-530-MSD

NORFOLK SOUTHERN RAILWAY
COMPANY, *et al.*,

Defendants.

_____ /

**PLAINTIFF CSX TRANSPORTATION, INC.'S CONSOLIDATED
OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

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1	6/29/19 Email Re: CSX-NIT with handwritten notes (NSR_00306367)	Filed Under Seal (AEO)
2	5/14/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00084753)	Filed Under Seal (AEO)
3	7/27/09 Email Re: CSX and NPBL - Letter to Manion, with attachment (NSR_00177916)	Filed Under Seal (Confidential)
4	Michael Wheeler, 2/24/20 Deposition Excerpts	Filed Under Seal (Confidential)
5	Donna Coleman, 3/24/20 Deposition Excerpts	Filed Under Seal (Confidential)
6	NS's Response to CSX's Interrogatory No. 1	Filed Under Seal (AEO)
7	Deposition Excerpts of Cannon Moss	Filed Under Seal (Confidential)
8	8/27/18 Email Re: Cannon Moss – NPBL (NSR_00005707)	Filed Under Seal (Confidential)
9	6/12/15 Email Re: Personnel – (Confidential) (NSR_00071467)	Filed Under Seal (AEO)
10	Randall Hunt, 2/18/20 Deposition Excerpts	Filed Under Seal (AEO)
11	Robert Girardot 2d Declaration, dated 3/5/21	Filed Under Seal (AEO)
12	Robert Girardot, 3/17/21 2d Deposition Excerpts	Filed Under Seal (AEO)
13	Thomas Capozzi, 1/22/21 Deposition Excerpts	Filed Under Seal (AEO)
14	CSX's 2d Supp. Responses to Defendant NPBL's Interrog. No. 3 and 4	Filed Under Seal (AEO)
15	7/19/1999 Letter to NPBL Rate Committee(NSR_00199530)	Filed Under Seal (Confidential)
16	8/25/2019 NPBL letter with handwritten notes (NSR_00199524)	Filed Under Seal (Confidential)
17	Sept. 1999 NPBL consent forms (NSR_00199515)	Filed Under Seal (Confidential)
18	1/1/17 Email Re: CSX intermodal doings (NSR_00071344)	Filed Under Seal (AEO)
19	7/31/09 Email Re: Rate Committee Follow up, attaching NS Internal Meeting Notes dated 7/29/09 (NSR_00027070)	Filed Under Seal (Confidential)
20	12/15/06 Letter enclosing 1/1/07 tariff (NSR_00306443)	Filed Under Seal (Confidential)
21	12/27/02 Letter enclosing 2/1/03 tariff (NSR_00306377)	Filed Under Seal (Confidential)

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Ex. No.	Description	Confidentiality Designation
22	4/20/09 Letter from Coleman, with attachments (NPBL009639)	Filed Under Seal (AEO)
23	3/29/99 Email Re: NPBL Rates (NSR_00199532)	Filed Under Seal (Confidential)
24	9/26/02 Email Re: NPBL - Rate Structure Committee Recommendations (NS Portion) (NSR_00306424)	Filed Under Seal (AEO)
25	10/24/06 Email Re: NPBL Rate Meeting (NSR_00306426)	Filed Under Seal (AEO)
26	7/16/09 Email Re: Rate Committee Packet, attaching rate committee information (NSR_00074104)	Filed Under Seal (Confidential)
27	6/16/09 Letter from T. Ingram to D. Stinson (CSXT0080856)	Filed Under Seal (Confidential)
28	6/23/2009 Email Re: NPBL Information (NSR_00084730)	Filed Under Seal (Confidential)
29	4/17/09 Email Re: NPBL (NSR_00027114)	Filed Under Seal (Confidential)
30	4/24/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00011118)	Filed Under Seal (Confidential)
31	9/24/09 NPBL Rate Committee Meeting Recap for NS Participants only (NSR_00035903)	Filed Under Seal (Confidential)
32	10/15/09 Letter from J. Booth (CSXT0082145)	Filed Under Seal (Confidential)
33	10/23/09 Email Re: NS Recommendations, with attachment (NSR_00035548)	Filed Under Seal (Confidential)
34	8/5/10 Letter from D. Stinson Re: Rail Service Connection to NIT _ CSXT Rate Proposal dated July 23, 2010 (NPBL007438)	
35	David Stinson, 2/26/20 Deposition Excerpts	Filed Under Seal (Confidential)
36	8/9/10 NPBL Board Meeting minutes, with handwritten notes (NSR_00000781)	Filed Under Seal (Confidential)
37	Steven Armbrust, 3/11/20 Deposition Excerpts	Filed Under Seal (Confidential)
38	8/5/10 Email Re: CSX NIT Operation Proposal (NSR_00073997)	Filed Under Seal (Confidential)
39	8/30/10 Email Re: CSX NIT Operation Proposal (NSR_00062857)	Filed Under Seal (Confidential)
40	9/3/10 Email Re: CSX NIT Operation Proposal (NSR_00062844)	Filed Under Seal (Confidential)
41	9/8/10 NPBL Board Meeting Minutes (NPBL019920)	Filed Under Seal (Confidential)
42	12/8/10 Email Re: NPB (CSX) Intermodal Service to NIT (NPBL012305)	Filed Under Seal (AEO)
43	12/27/10 Memorandum to NPBL Board Members Re: NPBL Management Response to CSXT Rate Proposal (NPBL012284)	Filed Under Seal (Confidential)
44	12/29/10 NPBL Board Meeting Minutes (NSR_00000704)	Filed Under Seal (Confidential)

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Ex. No.	Description	Confidentiality Designation
45	3/1/11 Letter from J. Yates to D. Stinson (NPBL012988)	Filed Under Seal (AEO)
46	4/12/11 Email Re: Agenda for Board of Directors Meeting (CSXT0110423)	Filed Under Seal (Confidential)
47	4/13/11 NPBL Board Meeting Minutes (NPBL017933)	Filed Under Seal (Confidential)
48	9/14/11 Email Re: NPBL - NS Response to MacDonald nomination (CSXT0127526)	Filed Under Seal (AEO)
49	9/16/11 Memorandum and Resolution Re: Selection Process for NPBL President & General Manager (CSXT0027044)	Filed Under Seal (AEO)
50	9/19/11 NPBL Board Meeting Minutes (CSXT0000508)	Filed Under Seal (Confidential)
51	9/23/11 Board Meeting Minutes (CSXT0000509)	Filed Under Seal (Confidential)
52	James Allan, 3/13/20 Deposition Excerpts	Filed Under Seal (AEO)
53	Robert Girardot Declaration dated 2/21/20	Filed Under Seal (AEO)
54	Master Rail Plan for The Port of Virginia (Senate Joint Resolution 69)	
55	Robert Girardot, 1/12/21 Deposition Excerpts	Filed Under Seal (AEO)
56	4/27/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00011108)	Filed Under Seal (Confidential)
57	4/3/09 Letter from R. Hood to D. Stinson Re: Proposed Purchase of Norfolk and Portsmouth Beltline Property (NPBL006972)	
58	12/2/09 Docket of Proceedings of NPBL Board Meeting (NPBL007205)	
59	7/5/09 Email Re: Port Norfolk Yard, attaching 6/29/09 Letter Re: Market Update (NPBL014367)	Filed Under Seal (AEO)
60	4/2/08 Email Re: NPBL Port Norfolk Yard (NSR_00084773)	Filed Under Seal (AEO)
61	3/31/15 Email Re: CSX Traffic to NIT via NPBL (NPBL010915)	Filed Under Seal (AEO)
62	8/29/12 Email Re: Meeting with VPA, Purdue re PMT (NSR_00065318)	Filed Under Seal (AEO)
63	Ryan Houfek, 12/9/20 Deposition Excerpts	Filed Under Seal (AEO)
64	3/31/15 Email Re: CSX Traffic to NIT via NPBL (SDT RES 000298)	Filed Under Seal (Confidential)
65	4/9/15 Email Re: Request for Operating Window (NPBL005672)	
66	Anthony MacDonald, Deposition Excerpts	Filed Under Seal (Confidential)

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Ex. No.	Description	Confidentiality Designation
67	4/9/15 Email Re: Request for Operating Window (NPBL024288)	Filed Under Seal (Confidential)
68	David Luebbers, 2/25/20 Deposition Excerpts	Filed Under Seal (Confidential)
69	MaryClare Kenney, 12/11/20 Deposition Excerpts	Filed Under Seal (AEO)
70	4/19/15 Email re: CSX move request--UPDATE; Information Only (CSXT0154004)	Filed Under Seal (Confidential)
71	6/23/2016 Email Re: CSX move (NPBL005643)	
72	7/29/09 NS Internal Meeting Notes - NPBL Rate Committee Meeting (NSR_00027071)	Filed Under Seal (Confidential)
73	7/9/15 Email Re: NPBL Agreements (NSR_00047112)	Filed Under Seal (Confidential)
74	5/21/15 Email Re: Plan for CSX Loading (CSXT0004998)	Filed Under Seal (Confidential)
75	5/27/15 Email Re: Empties for NIT (CSXT0001528)	Filed Under Seal (Confidential)
76	6/29/15 Email Re: CSX Cars (CSXT0154066)	Filed Under Seal (Confidential)
77	7/31/15 Letter from R. Hunt to C. Moss Re: Notification of intent to cancel certain trackage rights agreements (NSR_00104581)	Filed Under Seal (AEO)
78	4/18/16 Email Re: NPBL Term Sheet (Randy Edit) (NSR_00008141)	Filed Under Seal (Confidential)
79	3/15/16 Meeting Invitation Re: Review Strategy Regarding NIT Access (NSR_00005173)	Filed Under Seal (Confidential)
80	D. Coleman notes (NPBL000189)	
81	4/18/18 Email Re: Rate Proposal for Long Term Rail Service to NIT (NSR_00051329)	Filed Under Seal (Confidential)
82	4/19/18 Email Re: NPBL Agreement Questions (NPBL005881)	Filed Under Seal (AEO)
83	4/3/18 Email Re: NPBL – CSX (NSR_00006321)	Filed Under Seal (Confidential)
84	4/5/18 Email Re: Rate Proposal for Long Term Rail Service to NIT (NPBL006228)	
85	4/16/18 Letter from S. Armbrust Re: Election NPBL Directors at April 2018 Annual Meeting of the NPBL Shareholders (CSXT0101908)	Filed Under Seal (Confidential)
86	4/24/19 Agenda for NPBL Annual Stockholders' Meeting (CSXT0158238)	Filed Under Seal (Confidential)
87	Phillip Merilli, 3/2/20 Deposition Excerpts	
88	Jerry Hall, 2/21/20 Deposition Excerpts	
89	Thomas Hurlbut, 2/21/20 Deposition Excerpts	
90	5/18/18 Letter from S. Armbrust Re: Response of NPBL Management and Board to CSXT's Service Proposal (CSXT0142657)	Filed Under Seal (Confidential)

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Ex. No.	Description	Confidentiality Designation
91	CSX Corporate Rep. (Robert Girardot), 1/13/21 Deposition Excerpts	
92	NS Corporate Rep. (Kenneth Joyner), 2/19/20 Deposition Excerpts	Filed Under Seal (AEO)
93	Jeffrey Heller, 3/10/20 Deposition Excerpts	Filed Under Seal (Confidential)
94	Carl Warren Declaration, dated 2/21/20	Filed Under Seal (AEO)
95	2/17/15 Email Re: February 19 Forecast Meeting (NSR_00128851)	Filed Under Seal (AEO)
96	Jay Strongosky, 12/8/20 Deposition Excerpts	
97	Excel - 2016 RFP (CSXT0050597)	Filed Under Seal (AEO)
98	Dean Piacente, 1/15/21 Deposition Excerpts	
99	Carl Warren, 1/6/21 Deposition Excerpts	Filed Under Seal (AEO)
100	2/22/10 NS Ports and International Department Presentation (NPBL003225)	Filed Under Seal (Confidential)
101	9/2/10 Email Re: Questions, with attachment (NSR_00031335)	Filed Under Seal (Confidential)
102	Robert Martinez, 10/23/20 Deposition Excerpts	Filed Under Seal (AEO)
103	Article: <i>"What's at Stake in North Charleston Rail Debate?"</i>	
104	VPA Corporate Rep. (Catherine Vick), 1/19/21 Deposition Excerpts	Filed Under Seal (AEO)
105	12/16/15 Email Re: Follow-up (NSR_00122609)	Filed Under Seal (Confidential)
106	Cary Booth, 11/5/20 Deposition Excerpts	Filed Under Seal (Confidential)
107	Michael McClellan, 2/20/20 Deposition Excerpts	Filed Under Seal (Confidential)
108	Christopher Wagel, 12/7/20 Deposition Excerpt	
109	John Booth, 3/12/20 Deposition Excerpts	Filed Under Seal (Confidential)
110	7/25/08 Email re: Routing Containers over Norfolk to Columbus (NSR_00157631)	Filed Under Seal (Confidential)
111	Jeffrey Heller, 10/30/20 2d Deposition Excerpts	Filed Under Seal (Confidential)
112	3/22/17 Email Re [REDACTED] - Norfolk NIT Activity (CSXT0136053)	Filed Under Seal (AEO)
113	6/19/09 Email Re: CSX and NIT (NSR_00027097)	Filed Under Seal (Confidential)

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Ex. No.	Description	Confidentiality Designation
114	6/19/09 Email Re: The Port of Virginia - New On-Dock Rail at NIT (NSR_00027098)	Filed Under Seal (AEO)
115	3/1/17 Email Re: [REDACTED] (CSXT0096961)	Filed Under Seal (AEO)
116	Excel – Account Notes 2019 (CSXT0013901)	Filed Under Seal (AEO)
117	Fredrik Eliasson, 1/8/21 Deposition Excerpts	Filed Under Seal (Confidential)
118	4/13/18 Letter from J. Reinhart to C. Moss (CSXT0100756)	Filed Under Seal (Confidential)

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Plaintiff CSX Transportation, Inc. (“CSX”), by counsel, states as follows in opposition to the Motion for Summary Judgment filed by Defendant Norfolk Southern Railway Company (“NS”) (ECF Nos. 307, 308) and the Motion for Summary Judgment filed by Defendant Norfolk & Portsmouth Beltline Railroad Company (“NPBL” or the “Belt Line”) (ECF Nos. 296, 297):

INTRODUCTION

CSX’s Evidence. CSX is the victim of a decades-long effort by NS, on its own and in combination with NPBL, to exclude CSX from on-dock rail access at Norfolk International Terminal (“NIT”), the most important marine terminal in the Port of Virginia (“POV”)—a critical entry point through which almost all major ocean carriers move international intermodal traffic. Defendants’ efforts have so far succeeded, resulting in NS charging supracompetitive prices to ocean carriers who rely on NIT and inflicting hundreds of millions of dollars in harm to CSX in the form of lost business. NS has demonstrated an astonishing commitment to preventing CSX from gaining on-dock access at NIT via the NPBL, maintaining its monopoly through every means at its disposal.

In denying multiple motions to dismiss, this Court found CSX’s detailed allegations about Defendants’ scheme, except for one tortious interference count, were well-pleaded. *See* ECF No. 66. Now, after many months of discovery, Defendants claim that *no reasonable jury* could find those allegations substantiated. The record and the law disprove this remarkable assertion.

As Defendants’ documents show, NS has long viewed its stranglehold on NIT as critical to its success. NS’s own documents reveal the fundamental motivation underlying its conduct towards CSX since 1999: “[REDACTED]?” Other documents show not only that NS’s strategy of blocking CSX was effectively executed, but also the many ways that NS, both independently and in combination with NPBL, inflicted harm on CSX and competition generally.

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As one example, in 1999, after learning CSX initiated talks with Virginia International Terminals (“VIT”), the commercial entity that operates NIT, about “[REDACTED]” a senior NS executive asked an NS colleague: “[REDACTED]” CSX Ex. 1 (NSR_00306367). The colleague responded: “[REDACTED]” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” *Id.*

As another example, when NS learned in April 2009 that CSX was seeking a lower rate for NPBL services to NIT—which would have benefitted NPBL through significantly increased revenue—NS moved swiftly to block it through its appointed NPBL “rate committee” members and directors. An NS executive wrote to his colleagues: [REDACTED] [REDACTED].” CSX Ex. 2 (NSR_00084753 at -754) (emphasis added). As demonstrated by this email, NS saw CSX’s access NIT as a threat to its monopoly and “ [REDACTED] [REDACTED]” and NS’s rate committee members worked to block it. NS was committed to the goal of blocking CSX, and saw the only “challenge” as justifying its blatantly anticompetitive acts. *Id.* at -753. As NS’s Luebbbers candidly put it, the NS-appointed rate committee members needed simply to “ [REDACTED] [REDACTED]” *Id.*; see also CSX Ex. 3 (NSR_00177916) (letter drafted by NS executives prior to NPBL rate committee meeting, urging NS-appointed directors to “ [REDACTED] [REDACTED]”).

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Lest Defendants protest that these examples arise from earlier points in the conspiracy and thus support their statute of limitations arguments, the record also contains evidence of Defendants' actions to block CSX in later years, including 2015 and 2018. *For example*, when a surge in port congestion in early 2015 left CSX with no choice but to pay NPBL's exorbitant switch rate to move traffic to NIT via NPBL, NS-appointed NPBL directors and other NS personnel imposed unreasonable hurdles, making these moves operationally unviable. In total, NPBL moved only a handful of trains for CSX over a period of many months. Meanwhile, NPBL's Cannon Moss forwarded NS marketing personnel his communications with CSX, expressly so NS could protect its own competitive interests.

CSX knew when it brought this case that it had been precluded from rail access to NIT by Defendants' actions. But now Defendants' own documents have demonstrated just how far—and for how long—NS and NPBL have been willing to go to “block” CSX. As illustrated by the vignettes above, and the many more described herein, NS has pursued a decades-long campaign to keep CSX out of NIT via rail in order to preserve its own interests. It did this both *with* NPBL and also *at the expense of* NPBL, as the Complaint detailed and the evidence now shows.

The record amply supports CSX's claims and would certainly enable a reasonable jury to find for CSX with respect to both liability and relief. Summary judgment should be denied.

* * *

Defendants' Arguments. Defendants' arguments in favor of summary judgment rely on errors of law and assertions of fact that are, at the very least, disputed (if not directly contradicted by Defendants' own documents). Moreover, the Court should evaluate Defendants' current arguments against the backdrop of the inconsistent arguments, positions, and concessions they have previously advanced. Most strikingly, NPBL claimed at the motion to dismiss stage that it

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was incapable of conspiring with NS because the Defendants were a unitary entity under the *Copperweld* doctrine. *See* ECF No. 66 at 29. After its first motion was denied, NS filed a new motion to dismiss, belatedly claiming it “control[led]” NPBL. That motion remains pending. *See* ECF No. 115. But these arguments appear to have been forgotten by Defendants, who now argue there is *no evidence* of collusion. Defendants never bother to explain how they can assert that, on the one hand, they are a solitary unit with one controlling the other, while on the other hand claim there is no evidence from which a reasonable jury could conclude they worked in concert.

NS’s tardy, still-pending motion to dismiss and for judgment on the pleadings also asserts that “NSR’s exercise of control over NPBL—which is directly at issue in this litigation—is exempt from the federal antitrust and state law conspiracy claims asserted by CSXT.” ECF No. 116 at 10. This was a curious argument at the time, considering NS had conceded this point in its first, unsuccessful motion, but it is more curious still to see that NS has barely acknowledged this “exemption” argument in its current motion. Indeed, NS only notes briefly in passing that STB oversight “militates against antitrust intervention here.” NS Br. at 32.

The arguments Defendants do advance at this stage fare no better, whether as a matter of fact or law. Defendants contend, for example, that CSX’s antitrust claims are barred by the applicable limitations periods. It is well-settled, however, that Defendants cannot rely on the statute of limitations to escape the consequences of their continuing antitrust violations. Defendants’ statute of limitations arguments as to CSX’s other claims fail for the reasons this Court previously identified in ruling on Defendants’ motions to dismiss, which are now borne out by the factual record. Defendants also claim that the actions of NS-appointed NPBL directors cannot be attributed to NPBL for purposes of conspiracy. This argument misstates basic tenets of agency law, which provides that an individual director can be found to act on behalf of the

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corporation that he or she directs. It further ignores the substantial record evidence of conspiracy *not* involving the NS-appointed directors.

Defendants also argue that CSX has not properly supported its antitrust claims. NS's arguments about unilateral conduct and essential facilities are wrong on the law, and its protestations about the market ignore the realities of international intermodal transportation. NS—which maintains nearly 90 percent of international intermodal business at NIT and nearly 75 percent at the Port of Virginia (“POV”) intermodal terminals—also suggests that CSX should not complain about the anticompetitive harm inflicted because “CSX’s intermodal container traffic at NIT has *increased* by over 700% since 2010.” NS Br. at 1. This statistic is misleading, as evidenced by the fact that such an increase in CSX’s traffic has nonetheless failed to make a dent in NS’s monopoly hold on the market. That NS would exaggerate the significance of CSX’s growth at POV is unsurprising, in light of the substantial evidence showing NS’s use of every tool at its disposal to combat CSX’s efforts to economically access NIT. Between 2010 and 2020, the *total* volume of international intermodal business at the Port of Virginia increased substantially through infrastructure improvements and the expansion of the Panama Canal. CSX has competed vigorously for business wherever it can, despite the illegal constraints imposed by NS and NPBL. But CSX’s share of international intermodal traffic at NIT remains a small fraction of NS’s. Indeed, the empirical data show that the vast majority of CSX’s gains in market share come from its success at POV’s other container terminal, Virginia International Gateway (“VIG”)—where CSX is able to offer on-dock rail service and thus compete on equal footing with NS.

Defendants remaining arguments hinge on disputed facts that must be resolved by a jury. For instance, Defendants insist that CSX has access to NIT via NPBL, but just chooses not to pay the rate to use it. The record evidence shows, however, that the rate is set at a level designed to

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completely insulate NS from competition, and which has had the intended effect of making it economically infeasible for CSX to use NPBL for intermodal traffic. Defendants also suggest that NPBL could not accept CSX's proposals due to the "uniform rate" provision in its Operating Agreement—an argument this Court already rejected at the motion to dismiss phase. A reasonable jury clearly could find that CSX proposed a rate for intermodal service to NIT, which could have been published in a tariff and "uniformly" applied to other customers wanting to use the service. Moreover, missing from Defendants' briefs, despite their protestations that the \$210 rate is required to cover NPBL's costs, is the fact that every time NPBL management evaluated CSX's proposals, it determined that it would *make a profit* at the rate proposed by CSX. Why would NPBL *not* adopt a proposal it considered profitable, that would mutually benefit itself *and* one of its owners, and that would be consistent with the purpose for which it was created? A reasonable jury could easily conclude on this record that the answer is the conspiracy between itself and NS. Not to mention, even when CSX paid NPBL's excessive rate to move trains in 2015, Defendants acted in concert to prevent CSX from reasonably accessing NIT at *any* price.

The record reflects overwhelming evidence of conspiracy and anticompetitive conduct, supporting CSX's timely claims and undermining Defendants' arguments. Though NS suggests NIT is fungible with any other port on the East Coast, the record evidence and its own actions belie that claim. The Court need look no further for evidence of monopoly power and exclusionary conduct than NS's own documents, which demonstrate its deliberate and persistent efforts to keep CSX out of NIT at all costs because, in its own words, it had "the most to lose."

Defendants' motions should be denied so that a jury may weigh the evidence.

STATEMENT OF DISPUTED MATERIAL FACTS

Defendants' statements of fact overlap considerably. CSX responds to both in a consolidated

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fashion here, with citations to the specific paragraph numbers from each. CSX does not dispute the facts contained in NS SOF ¶¶ 1-3, 5-7, 13-14, 18, 46-47, 51, 53, and 57, or in NPBL SOF ¶¶ 1-5, 11-14, 16-17, 20-22, 34, and 37.¹ All other facts are disputed, as explained below.

I. The Parties

[Disputed: NS SOF ¶¶ 4, 16-17; NPBL SOF ¶ 6]

1. CSX and NS are Class 1 railroads operating in the eastern United States. NS SOF ¶ 1; ECF No. 66 at 2. NPBL is a terminal switching railroad (sometimes called a “short line”) in Hampton Roads, Virginia. NS SOF ¶ 2; NPBL SOF ¶¶ 1-2. NPBL is currently owned 57% by NS and 43% by CSX. NS SOF ¶ 3; NPBL SOF ¶ 4.

2. NPBL was founded by eight railroads in 1896 “for the mutual benefit of each [of the railroads] in the interchange of business.” ECF No. 1-1 at 3. NPBL’s Operating Agreement provides that each railroad will have “equal representation” in the Belt Line, *see id.*, and that each must “co-operate cordially in encouraging the business of the [NPBL],” *id.* at 6.

3. In 1989, the NPBL’s then-existing owners—CSX, Norfolk and Western Railway Company (“NW”) and Southern Railway Company (“SR”)—agreed to amend “Article Fourth” of the Operating Agreement to allow CSX to appoint two directors and NW and SR to collectively appoint three.² NS SOF ¶ 3, NPBL SOF ¶ 5. This agreement expressly did not “amend, alter, or affect any other provision of the NPBL Agreement.” NS Ex. 3 ¶ 2.

4. NPBL’s president is the sixth voting member of the Belt Line’s Board. NPBL SOF ¶ 5. Since at least 2005, the NS-controlled NPBL Board has installed a former NS employee in this position. *See CSX Ex. 4* (Wheeler Dep. 31:18-22); *CSX Ex. 5* (Coleman Dep. 27-17-21;

¹ CSX refers to its exhibits as “CSX Ex.,” NS’s as “NS Ex.,” and NPBL’s as “NPBL Ex.”

² NW and SR subsequently finalized their merger, becoming NS. *See NS SOF ¶ 3 & n.2.*

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53:11-13). The two most recent past presidents, who served from 2005 to 2011, returned to work at NS following their tenures at the Belt Line. *See CSX Ex. 4* (Wheeler Dep. 32:1-4); *CSX Ex. 6* (NS's Resp. to CSX's Interrog. No. 1 at 9, 14). Current NPBL President Cannon Moss has made clear he intends to do the same. *See CSX Ex. 7* (Moss Dep. 24:1-11); *CSX Ex. 8* (NSR_00005707); *CSX Ex. 9* (NSR_00071467). Donna Coleman—NPBL's Vice President, Comptroller, and Corporate Secretary and a non-voting member of the NPBL Board—is also a former NS employee. *See CSX Ex. 5* (Coleman Dep. 9:15-16, 20:6-9).

5. Under the Operating Agreement, the Belt Line's purpose is to interchange railcars for its owners, meaning that NPBL receives cars from NS or CSX and delivers them to locations on its tracks, or vice versa. NPBL SOF ¶ 3.

6. One location for which NPBL provides switching services is Norfolk International Terminal ("NIT"), the largest marine terminal in Virginia and one of the most important terminals for international intermodal cargo on the East Coast. *See NS Ex. 7* ¶ 24 & *Ex. 3*; *NS Ex. 71* ¶ 53 & *Ex. 4*. NIT is owned by the VPA and operated by VIT. *See NS SOF* ¶ 18.

7. NS has access to on-dock rail at NIT over its own tracks.³ *NS SOF* ¶ 14. NS currently travels through NIT in a continuous clockwise fashion, in part by traversing tracks owned by NPBL, for which NS pays a nominal trackage rights fee. *See CSX Ex. 10* (Hunt Dep. 20:2-22:24); *CSX Ex. 7* (Moss Dep. 164:6-16).

8. NPBL has on-dock access at NIT via trackage rights over NS's tracks. *NS SOF* ¶ 14. NPBL currently can enter and exit NIT using the terminal's "North Gate." *See NS SOF* ¶ 17. Railroads effectively manage operational patterns much like NPBL's at other terminals. *See*

³ The term "on-dock" refers to a railroad's ability to move its train into a marine terminal so that containers can be loaded onto railcars either on or near the dock itself. *See NS Ex. 10* ¶ 25.

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CSX Ex. 11 (2d Girardot Decl. ¶ 10); **CSX Ex. 12** (2d Girardot Dep. 86:24-93:12). Tom Capozzi, VIT's Chief Sales Officer (*see* NS SOF ¶ 18), testified that "[REDACTED]" about NPBL's route at NIT.⁴ **CSX Ex. 13** (Capozzi Dep. 40:9-20).

9. Although NPBL does not compete for ocean carrier business, NS SOF ¶ 4; NPBL SOF ¶ 6, NPBL and NS are the only two means to access on-dock rail at NIT, *see* NS SOF ¶ 14.

II. "[REDACTED]": NS and NPBL Conspire to Block CSX at NIT

10. For more than two decades, NS and NPBL have conspired to maintain NS's control of intermodal freight moving by rail through the Port of Virginia ("POV"). Defendants have produced *dozens* of internal documents and communications evidencing this conspiracy and the many overt acts committed to further it. *See CSX Ex. 14* (CSX's 2d Supp. Resp. to NPBL's Interrog. No. 3 & 4) (describing documents reflecting NPBL's participation in the conspiracy).

11. Defendants' goal is to block CSX's ability to access on-dock rail at NIT. For example, after learning CSX initiated talks with VIT "[REDACTED]", NS VP of Intermodal Michael McClellan asked an NS colleague: "[REDACTED]" **CSX Ex. 1** (NSR_00306367) (emphasis added). NS intermodal manager Augie Eckhardt responded: "[REDACTED]" *Id.* (emphasis added). Defendants eventually did increase the NPBL switch rate and formulate a trackage rights "dispute." *See* CSX SOF ¶¶ 56-61.

⁴ Although NS suggests NS's and NPBL's varying routes mean "two trains *cannot* be on the tracks at the same time," none of the documents cited says that. *See* NS SOF ¶ 17. Moreover, as the cited testimony from CSX's former Portsmouth terminal manager Tony MacDonald shows, any challenges associated with NPBL's current route or coordination with NS trains could be alleviated by the Port or NS allowing NPBL to access NIT via the southern gate. *See* NS Ex. 19 at 93:9-14.

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12. As NS's VP of Strategic Planning has explained, CSX's ability to compete for international intermodal business is limited because [REDACTED].” CSX Ex. 18 (NSR_00071344) (emphasis added).

13. NS has handled between [REDACTED]% and [REDACTED]% of international intermodal business at the Port of Virginia—and between [REDACTED]% and [REDACTED]% at NIT—between 2009 and 2020. See CSX Ex. 6 (NS's Resp. to CSX's Interrog. No. 6); NS Ex. 71 ¶ 111 & Ex. 13.

a. Defendants Use NPBL's Switch Rate to Block CSX
[Disputed: NS SOF ¶¶ 42-44; NPBL SOF ¶¶ 7-8]

14. One way Defendants have blocked CSX's access to on-dock rail at NIT is through NPBL's switch rate. Although the NPBL Operating Agreement states that “a uniform rate shall be fixed for the movement of freight cars . . . regardless of distance,” see NS SOF ¶ 42; NPBL SOF ¶ 7, the NPBL Board has the ability to and historically has “agree[d] to override” this provision, such as by approving rates that vary by commodity type and international versus domestic business. CSX Ex. 5 (Coleman Dep. 137:21-138:8); see also CSX Ex. 19 (NSR_00027070) (“[REDACTED] CSX Ex. 20 (NSR_00306443); CSX Ex. 21 (NSR_00306377).

15. The Operating Agreement also provides that the NPBL rate may be “adjusted from time to time as to yield a net revenue sufficient to pay . . . a dividend of six per cent” to its owners. ECF No. 1-1 at 6. Defendants suggest that this provision prohibits the Belt Line from earning any profit, see NPBL SOF ¶ 7; NS SOF ¶ 43, but nothing in the Operating Agreement prohibits NPBL from earning revenues in excess of the 6% dividend, and NPBL's own documents reflect that profitability is one of its goals. See, e.g., NPBL Ex. 4 (NPBL Annual Reports 2010-2019, each describing intent to “[REDACTED]”).

16. NPBL periodically convenes “rate committees,” purportedly to “evaluate and propose adjustments to the switch rate to the NPBL Board for a vote.” NS SOF ¶ 44; *see also* **CSX Ex. 22** (NPBL009639). Historically, these committees have been comprised of NPBL management and NS and CSX personnel. *See* **CSX Ex. 5** (Coleman Dep. 110:6-15).

[REDACTED]”); CSX Ex. 24 (NSR_00306424)
(email from NS intermodal market manager Chris Luebbbers, summarizing 2002 rate committee meeting, including NS’s concern that [REDACTED]
[REDACTED]
[REDACTED]”); CSX Ex. 25 (NSR_00306426 at -
427) (email from Luebbbers, summarizing 2006 committee’s recommended [REDACTED]
[REDACTED]
[REDACTED]).

18. In 2009, NPBL convened a rate committee “[REDACTED]
[REDACTED]
[REDACTED].” **CSX Ex. 26** (NSR_00074104 at -107). [REDACTED]
“[REDACTED]. **CSX Ex.**
19 (NSR_00027070 at -071). As part of the discussion, CSX recommended NPBL reduce its rate
to allow for CSX intermodal traffic to NIT, which would increase NPBL’s revenues. *See CSX*

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[REDACTED] *Id.* at -917.

Though the rate committee had yet to meet, the letter included NS's assumption that [REDACTED]

[REDACTED] *Id.* It concludes: "[REDACTED]"

[REDACTED]"⁵ *Id.* at -918 (emphasis added).

22. At the July 29, 2009 rate committee meeting, NPBL management made several proposals to the committee. *See CSX Ex. 26* (NSR_00074104 at -123). First, management recommended replacing the existing \$ [REDACTED] rate and the \$ [REDACTED] rate with a single \$210 line-haul switch rate, not out of concern for any perceived violation of the NPBL Operating Agreement, but because the NS accounting systems used by the Belt Line could not handle the two-tiered structure. *See CSX Ex. 19* (NSR_00027070 at -073); *see also CSX Ex. 5* (Coleman Dep. 117:18-118:18) (NPBL wanted to eliminate dual rates because it could not distinguish between domestic and import/export traffic).

23. NPBL management also recommended adopting a \$ [REDACTED] per car rate for "unit trains," i.e., trains moving more than forty cars to one destination under a single waybill. *CSX Ex. 19* (NSR_00027070 at -073). Management developed this rate by reviewing rates charged by other short lines for similar services and evaluating NPBL's costs in a "worst case" scenario. *See id.* CSX expressed interest in using this rate to move trains of intermodal freight to and from NIT,

⁵ This is not the first time that NS personnel sought to influence the votes of NS-appointed NPBL directors to preserve NS's competitive position, without regard for NPBL's independent business interests. *See, e.g., CSX Ex. 15* (NSR_00199530); *CSX Ex. 16* (NSR_00199524) ([REDACTED])

[REDACTED] and *CSX Ex. 17* (NSR_00199515) [REDACTED]

”).

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though these moves involved multiple waybills. *See id.* NPBL management said that it was not opposed to dropping the “one waybill” requirement for this traffic. *See id.*

24. Within days of this meeting, NS’s Luebbers sent NS rate committee members McLemore and Cronk his draft recommendations, including that the NPBL Board should “[REDACTED]”—a proposal that would *increase* the rate for CSX’s traffic to NIT. **CSX Ex. 19** (NSR_00027070 at -070); *see* CSX SOF ¶ 17. Luebbers debated whether NS should recommend approving the \$210 switch rate, but recommended “against the \$[REDACTED] unit train per car rate” proposed by NPBL management. *Id.* As he explained:

[REDACTED]
[REDACTED] *Id.*

25. During the next rate committee meeting, CSX committee members supported the consolidated \$210 rate *and* the [REDACTED] per car unit train rate proposed by NPBL management. **CSX Ex. 31** (NSR_00035903 at -905). CSX also explained that it wanted to develop an operating plan to move regular volumes to NIT at the \$[REDACTED] per car rate. *Id.*

26. NS rate committee members opposed the \$[REDACTED] rate, questioning whether the analysis conducted by NPBL management was sufficient. *Id.* After NS raised this issue, management suggested it would reconsider its evaluation, stating that “[REDACTED] [REDACTED].” *Id.* NS rate committee members encouraged NPBL to negotiate “[REDACTED] [REDACTED]” rather than incorporating the \$[REDACTED] rate into the tariff. *Id.*

27. Following this meeting, the CSX-appointed members of the NPBL rate committee submitted a formal recommendation to the NPBL Board, including an economic and operational

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analysis supporting the [REDACTED] per car unit train rate proposed by Belt Line management. **CSX Ex. 32** (CSXT0082145 at -146). CSX also proposed adding a volume-based discount to the line-haul tariff, to increase NPBL's revenue and "sharply enhance [NPBL's] business prospects and competitive offerings." *Id.*

28. The NS-appointed rate committee members submitted a formal recommendation opposing the \$ [REDACTED] rate. **CSX Ex. 33** (NSR_00035548). They recommended the NPBL Board disapprove this rate because "[REDACTED]" *Id.* at -549.

29. In December 2009, NPBL management presented the Board with proposed tariff changes, including the \$210 line-haul rate but *not* the \$ [REDACTED] per car unit train rate or the volume-based discount proposed by CSX. *See* NPBL Ex. 19 at -302, -318. The three NS-appointed NPBL directors voted to adopt the changes in the NPBL proposed tariff "[REDACTED]" *See id.* at -302. Neither CSX-appointed director voted to approve the tariff. *Id.* The \$210 rate became effective on January 1, 2010, and it remains in effect today. NS SOF ¶ 47; NPBL SOF ¶ 8.

c. CSX's 2010 Proposal

[Disputed: NS SOF ¶¶ 54-55; NPBL SOF ¶¶ 25-27]

30. In early 2010, in response to NS's purported desire to review a "[REDACTED]" *see CSX Ex. 33* (NSR_00035548 at -549), CSX developed a comprehensive plan to access on-dock intermodal container service at NIT via NPBL. *See* NS Ex. 91 (NPBL007431) ("2010 Proposal"). In the 2010 Proposal, CSX proposed paying NPBL \$37.50 per container for intermodal traffic to and from NIT, a rate higher than that charged by Commonwealth Railway ("CWRY"), the short line providing switching services to NS and CSX at VIG, the terminal just across the Elizabeth River from NIT. *Id.* at -433. To reduce any risk to

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NPBL, CSX included a volume commitment, *see id.*, and offered to allow NPBL to use CSX's locomotives and fuel *for free*, *id.* at -432. The 2010 Proposal also included a detailed operating plan. *Id.* Given NS's recommendation that NPBL should negotiate "[REDACTED]" instead of a tariff, *see CSX Ex. 31* (NSR_00035903 at -905), CSX offered in the 2010 Proposal to memorialize the proposed terms in a contract, *see NS Ex. 91* at -433; *see also NS SOF ¶ 53*, though nothing in the proposal was inconsistent with the rate being applied to other NPBL customers.

31. David Stinson, then-president of the Belt Line, responded to the 2010 Proposal on August 5, 2010. *See CSX Ex. 34* (NPBL007438). Stinson stated that CSX's proposal would require hiring more personnel, which he projected would reduce NPBL's potential increased operating income under the proposal from \$146,000 to \$85,000. *See id.* at -438; *see also CSX Ex. 35* (Stinson Dep. 164:19-167:11) (NPBL management did no analysis suggesting the proposal would not generate positive operating income). Stinson also questioned whether the proposal complied with the Operating Agreement's "uniform rate" provision (*see CSX SOF ¶ 14*), and a prohibition on "foreign" locomotives in the NPBL by-laws. *See CSX Ex. 34* at -438. CSX promptly addressed Stinson's concerns, explaining that it was not opposed to the proposed rate being incorporated into NPBL's tariff or NPBL using its own locomotives (which are leased from NS). *See CSX Ex. 36* (NSR_00000781 at -819); *CSX Ex. 37* (Armbrust Dep. 203:1-14). Stinson testified that this response addressed his concerns. *See CSX Ex. 35* (Stinson Dep. 157:1-159:24).

32. Shortly after CSX submitted the 2010 Proposal, NS began to "review" it. *See CSX Ex. 38* (NSR_00073997). NS's Chris Luebbbers—an intermodal sales and marketing manager with no operational experience and no affiliation with NPBL (*see CSX Ex. 4* (Wheeler Dep. 123:5-13))—took the lead. Over the next several weeks, NS employees worked to identify economic

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and operational barriers that could be used to “argue” against the proposal, including route timing and terminal congestion. *See CSX Ex. 39* (NSR_00062857); *CSX Ex. 40* (NSR_00062844).

33. At the September 8, 2010 NPBL Board meeting, NPBL management presented the 2010 Proposal to the Board. *See CSX Ex. 41* (NPBL019920). The Board directed management “[REDACTED]” *Id.* Management was to report back “in 30 days.” *Id.* Despite these statements, handwritten meeting notes from an unidentified NS-appointed NPBL director reflect that NS had no intention of fairly assessing the proposal. *See CSX Ex. 36* (NSR_00000781 at -781) (“[REDACTED]”).

34. On October 8, 2010, Stinson relayed to the NPBL Board that management had met with NS operations to evaluate the 2010 Proposal, and that he would update the Board within 30 days after receiving additional information from NS. *See CSX Ex. 42* (NPBL012305). Sixty days later, however, NS had still not produced Stinson the information. *See id.*

35. On December 27, 2010, the CSX-appointed members of the NPBL Board sent a memorandum to the Board, requesting that it (1) act to remove any barriers preventing fair consideration of the 2010 Proposal, and (2) direct NS to conclude its operational review of the 2010 Proposal no later than March 30, 2011. *CSX Ex. 43* (NPBL012284).

36. At the December 29, 2010 NPBL Board meeting, Stinson presented “[REDACTED]” *CSX Ex. 44* (NSR_00000704 at -712). Management’s analysis showed that the proposal would result in positive net income to NPBL *under either scenario*. *See id.* at -736.

37. Following discussion, a motion was made and seconded that NPBL be allowed to use CSX locomotives in service to NIT. *Id.* at -712. Before a vote could be taken, however, NS-

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appointed members of the NPBL Board moved to table the vote “ [REDACTED] [REDACTED].” *Id.* The motion at first did not pass because Stinson voted against it, along with the two CSX-appointed directors. *Id.* An amended motion to table the vote, which promised that [REDACTED] [REDACTED] was unanimously approved. *Id.*

38. On March 1, 2011, NS’s Jeff Yates rejected Stinson’s request for service to NIT in connection with the 2010 Proposal. *See CSX Ex. 45* (NPBL012988). This letter does not mention (much less “address”) the locomotive issue discussed at the December Board meeting.

39. On April 11, 2011—approximately eight months after CSX’s proposal was tendered to NPBL for consideration—NS-appointed NPBL director Jake Allison emailed NPBL’s Donna Coleman, stating for the first time that the NS-appointed directors believed [REDACTED] [REDACTED] [REDACTED] [REDACTED] CSX Ex. 46 (CSXT0110423). Allison also said the NS directors did not believe the Board could [REDACTED] [REDACTED] [REDACTED], *see CSX SOF ¶¶ 14, 26.*

40. At the April 2011 NPBL Board meeting, a vote was requested on the motion about NPBL’s use of CSX’s locomotives. *See CSX Ex. 47* (NPBL017933 at -938). The motion did not pass because all NS-appointed Board members voted against it.⁶ *Id.* Soon after, NS removed

⁶ Defendants’ suggestion that the 2010 Proposal was never raised for a vote (NS SOF ¶ 55; NPBL SOF ¶ 27) ignores the evidence reflecting multiple attempts by CSX to obtain a vote on core

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Stinson as president and replaced him with current NPBL President Cannon Moss, who had been employed in a business development role at NS. *See CSX Ex. 7* (Moss Dep. 15:21-16:7).

41. When NS first nominated Moss as Stinson's replacement, CSX expressed serious concerns about his qualifications based on his limited experience with rail operations. *See CSX Ex. 48* (CSXT0127526). CSX proposed a candidate with significantly more relevant experience, but the NS-appointed members of the NPBL Board refused to interview him and installed Moss over CSX's objections. *See CSX Ex. 49* (CSXT0027044) (Sept. 11, 2011 memorandum from CSX-appointed directors, asking the Board conduct interviews before selecting a new president); *CSX Ex. 50* (CSXT0000508) (Sept. 14, 2011 Board minutes reflecting Board agreed to table election pending interviews of proposed candidates); *CSX Ex. 51* (CSXT0000509) (Sept. 19, 2011 Board minutes installing Moss as president without conducting the requested interviews and without all CSX directors present).

42. Defendants suggest that, in developing the 2010 Proposal, CSX did not consider NPBL's costs. NS SOF ¶ 54; NPBL SOF ¶ 26. None of the evidence cited supports this conclusion. First, all of the testimony from CSX witnesses relates to the 2009 rate committee, not the 2010 Proposal. *See NS Ex. 92* at 69:4-8, 72:7-11, 123:19-124:4 (John Booth testifying that, in supporting the 2009 rate committee, he did not *personally* review NPBL's costs, because "[o]ther folks on the committee . . . dealt with that"), NPBL Ex. 20 at 124:2-4 (same); *CSX Ex. 52* (Allan Dep. 127:7-135:15) (CSX's James Allan testifying that the recommended volume-based discount was based on revenue, not cost, but also noting CSX *did* consider incremental costs to NPBL associated with additional traffic). The only cited testimony pertaining to the 2010 Proposal comes

elements of the proposal, as well as the evidence of artificial barriers constructed by NS to delay and ultimately prevent a vote. *See CSX Ex. 37* (Armbrust Dep. 211:17-213:7).

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from NS's Mike Wheeler, who said that the NPBL Board [REDACTED] [REDACTED]. *See* NS Ex. 80 at 117:14-118:7; *see also* CSX Ex. 4 (Wheeler Dep. 119:16-120:6) ([REDACTED] [REDACTED]). The financial analysis requested by NS-appointed directors showed the Belt Line would cover its costs *and* make money under either scenario. *See* CSX SOF ¶ 36.

d. Defendants Impose Logistical and Operational Obstacles to Access NIT
[Disputed: NS SOF ¶¶ 15, 63-67, 75-77; NPBL SOF ¶ 10, 15, 19, 28-33, 35]

43. In 2008, NS discontinued service on a segment of track located near NIT, often called the “Diamond,” where NPBL had maintained trackage rights.⁷ NS SOF ¶¶ 76-77; NPBL SOF ¶¶ 19-20. The Diamond had allowed NPBL to access NIT via “an efficient, progressive move.” CSX Ex. 53 (Girardot Decl. ¶ 7). Without it, NPBL trains carrying CSX intermodal freight must travel a longer distance and move into NS's Portlock Yard, where engines have to be attached to the back of the train before proceeding along NS's track (where NPBL has trackage rights) to NIT. *Id.*; *see also* CSX Ex. 7 (Moss Dep. 170:11-172:20); CSX Ex. 10 (Hunt Dep. 159:3-160:7). As the Port of Virginia has recognized, this increases CSX's operational costs to access NIT. *See* CSX Ex. 54 at 23; *see also* CSX Ex. 53 (Girardot Decl. ¶ 7) (removal of Diamond results in long delays and unequal treatment relative to NS trains); CSX Ex. 55 (Girardot Dep. 93:5-95:20) (describing burdensome operations required to access NIT via NPBL without the Diamond); CSX Ex. 56 (NSR_00011108) (2009 email from NS's Luebbbers, explaining that the Diamond “was conveniently removed when the Ford plant shut down”).

44. In 2009, NPBL rejected CSX's offer to purchase the Belt Line's Port Norfolk Yard

⁷ Although NPBL suggests the NPBL Board agreed to discontinue its trackage rights due to “costs,” NPBL SOF ¶ 19, the meeting minutes cited imply the Board discussed costs associated with an “alternative route” to the Diamond. *See* NPBL Ex. 16 at -847.

(also known as “Pinner’s Point”), despite its declining revenues and stated need to increase its cash flow. *See CSX Ex. 57* (NPBL006972); *CSX Ex. 58* (NPBL007205 at -213). NPBL’s Stinson characterized CSX’s opening offer as [REDACTED]

(NPBL014367 at -369). NS identified CSX's offer to purchase this property as a threat, because it would have [REDACTED]

_____” on this issue.⁸ CSX Ex. 3

(NSR_00177916 at -918); see also **CSX Ex. 30** (NSR_00011118) (NS's Cronk: ' [REDACTED]

NS's

Luebbers: “

); CSX Ex. 60 (NSR_00084773) (email between Heller and NS's John Friedmann, noting

that NS was “

_____).

45. Apart from one unique instance in 2010,⁹ NPBL moved no international intermodal

⁸ NS's suggestion the NPBL Board collectively agreed that NPBL "should hold off on selling" the Pinner's Point property, NS SOF ¶ 75, misunderstands the timeline of events. After rejecting CSX's offer in 2009, NPBL executed an agreement to sell the property to a third party, but that sale eventually fell through. *See* NS Ex. 83 at 91:5-12. Nearly two years later, in connection with a *new* unsolicited purchase offer, the NPBL directors agreed selling was not in the best interests of NPBL. *See* NS Ex. 86.

⁹ In January 2010, CSX paid the \$210 rate to NPBL for the movement of a single train from NIT, to accommodate a customer's need for a one-time move of empty containers from Virginia to Wilmington, North Carolina. CSX Ex. 63 (Houfek Dep. 101:18-106:24). CSX used this as a "PR" opportunity, including having professional photographs taken of the train. *Id.* at 105:16-21. These benefits, combined with the ability to "[redacted] led one

traffic for CSX until March 2015. **CSX Ex. 5** (Coleman Dep. 179:10-19); **CSX Ex. 61** (NPBL010915). At that time, during a period of extreme port congestion across the East Coast, CSX paid NPBL’s \$210 rate to move backlogged freight at NIT, recognizing that doing so under these circumstances would “[REDACTED].” **CSX Ex. 52** (Allan Dep. 172:16-173:9); *see also* NPBL SOF ¶ 33.¹⁰

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[REDACTED].”). According to Capozzi, [REDACTED]
[REDACTED]. See **CSX Ex. 13** (Capozzi Dep. 238:23-24).

48. After the first train in April 2015, CSX tried to use NPBL to move other international intermodal freight to and from NIT, but NS imposed serious difficulties, repeatedly refusing to provide operating windows based on vague, unexplained “proprietary issues.” See, e.g., **CSX Ex. 65** (NPBL005672) (NPBL unable to provide operating window due to NS’s claimed “proprietary operational issues”).

49. When CSX’s Portsmouth terminal manager Tony MacDonald spoke with the NS trainmaster, he was told: “[P]roprietary means proprietary. If you don’t work for the NS, then I can’t help you with what the operating issue is, as they’re proprietary operating issues.” **CSX Ex. 66** (MacDonald Dep. 152:15-154:4). When MacDonald drove the length of NS’s track, however, he identified no visible operating issue that would prevent NPBL’s movement. See *id.*

50. Moss kept NS’s Chris Luebbbers—an NS intermodal *sales* person—apprised of CSX’s attempts to use NPBL to access NIT. See **CSX Ex. 67** (NPBL024288) (minutes after receipt of MacDonald’s email, Moss forwards to Luebbbers, commenting “[REDACTED]”). Luebbbers testified that Moss kept him informed in connection with his *sales* role at NS, so he would be aware of how CSX’s attempts to move traffic via NPBL would impact NS’s customers.¹¹ See **CSX Ex. 68** (Luebbbers Dep. 281:24-282:14).

51. CSX’s efforts to use NPBL to move international intermodal traffic to and from NIT

¹¹ This was not the first time Moss shared CSX’s commercial information with Luebbbers. See **CSX Ex. 62** (NSR 00065318) (August 2012 email from Heller to NS’s Rob Martinez, stating that, “[REDACTED]”).

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during 2015 proved unworkable.¹² *See, e.g., CSX Ex. 66* (MacDonald Dep. 165:20-166:11) (describing that the “process of going back and forth to NIT [via NPBL] was melting down” because of the inability to get operating windows to move trains, and noting that CSX cars “ended up stuck over at NIT for 21 days”); *see also CSX Ex. 69* (Kenney Dep. 28:2-24).

52. The situation escalated to the point that CSX’s Senior VP of Operations personally called NS executives to request an operating window. **CSX Ex. 70** (CSXT0154004); **CSX Ex. 66** (MacDonald Dep. 171:21-173:17) (when a CSX train was “captive” at NIT, MacDonald called CSX’s Senior VP of Operations, “asking her to make a phone call over to the guys in Atlanta or Norfolk to let the train go and quit quoting their proprietary issues”).

53. NPBL ultimately moved a small number—about which witness accounts vary—of international intermodal trains for CSX over a period of several months in 2015. **CSX Ex. 7** (Moss Dep. 128:6-129:4; 130:17-131:1) (NPBL moved intermodal traffic for CSX for a “one- or two-month period” ending before June 2015); **CSX Ex. 13** (Capozzi Dep. 39:18-21) (three trains); **CSX Ex. 55** (Girardot Dep. 232:6-20) (one train over the course of a month); **CSX Ex. 69** (Kenney Dep. 28:2-24) (one train).¹³ By contrast, NS moves multiple of its own trains *daily* at NIT. *See CSX*

¹² NPBL cites testimony from MacDonald to suggest that the “operating plan” developed in 2015 was “workable.” *See* NPBL SOF ¶ 31. But whether the plan on paper was “workable” is beside the point; the record contains substantial testimony from MacDonald and others reflecting that *implementation* of that plan was nothing short of a disaster. *See* CSX SOF ¶¶ 48, 49, 51, 52.

¹³ NS and NPBL suggest that NPBL moved nine trains for CSX in 2015, based on testimony from CSX’s MacDonald. *See* NS SOF ¶ 64, NPBL SOF ¶¶ 30, 33. But several exhibits shown to MacDonald reflect *plans* to move CSX trains, not confirmed moves. *See, e.g., CSX Ex. 74* (CSXT0004998); **CSX Ex. 75** (CSXT0001528); **CSX Ex. 76** (CSXT0154066). Moreover, several of these moves were non-revenue moves made at VIT’s request. At a minimum, MacDonald’s testimony, these exhibits, and other record testimony show that the precise number of trains moved in 2015 is in dispute. NPBL also suggests that CSX did not “consult” MacDonald “about the 2015 rail moves” before filing suit. *See* NPBL SOF ¶ 32. But MacDonald testified only that he was not engaged in the process of filing this litigation, *not* that he did not discuss these issues with anyone

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Ex. 39 (NSR_00062857 at -860).

54. Due to the onerous restrictions and inexplicable delays imposed by Defendants, CSX lost business from customers who could not be adequately and reliably serviced without on-dock access at NIT. *See CSX Ex. 69* (Kenney Dep. 31:6-21; 104:4-18).

55. In June 2015, NPBL's Moss emailed CSX's MacDonald to inquire whether CSX intended to continue moving intermodal freight to NIT via NPBL, because without revenue from these moves, Moss would have to lay off NPBL employees. *See CSX Ex. 71* (NPBL005643).

e. Defendants' Ongoing Trackage Rights "Dispute"

[Disputed: NS SOF ¶¶ 72-74; NPBL SOF ¶¶ 53-54]

56. According to NPBL, the 1916 Joint Facility Agreement for NPBL to move over NS's tracks, "[REDACTED]." **CSX Ex. 72** (NSR_00027071 at -074); **CSX Ex. 5** (Coleman Dep. 143:1-15). Pursuant to this agreement, NPBL paid NS a fixed trackage rights fee that did not vary based on the number of cars moved. *See CSX Ex. 10* (Hunt Dep. 123:23-127:14). NPBL's Cannon Moss estimated this fee worked out to \$[REDACTED] per car, in addition to certain fixed costs. *See CSX Ex. 7* (Moss Dep. 175:12-178:8).

57. In July 2015, while CSX tried to access NIT using NPBL, NS internally worked to "[REDACTED]" NPBL and NS. **CSX Ex. 73** (NSR_00047112). NS's Chris Luebbbers recommended that "[REDACTED]"
[REDACTED]
[REDACTED]
[REDACTED]." *Id.*

58. NS provided notice to NPBL on July 31, 2015—not long after CSX's efforts to use

at CSX. *See NPBL Ex. 12* at 220:13-16. Moreover, as the record evidence demonstrates, many people at CSX were acutely aware of the obstacles imposed by Defendants during this period.

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NPBL to access NIT—that it intended to cancel NPBL’s trackage rights over NS leading into NIT, unless the parties could negotiate new agreements to preserve NPBL’s access. *See CSX Ex. 77* (NSR_00104581)

59. Although NS stated externally that it intended for the parties’ new trackage rights agreement to afford NPBL “materially the same access” to NS’s tracks, *see* NS SOF ¶ 72, internally it made clear that its purpose was (1) [REDACTED]

[REDACTED]
CSX Ex. 78 (NSR_00008141).

60. The trackage rights negotiation was part of NS’s broader “strategy” related to CSX’s NIT access—specifically NS’s “[REDACTED].” CSX Ex. 79 (NSR_00005173).

61. NS demanded a variable trackage rights fee of \$[REDACTED] per car. *See CSX Ex. 10* (Hunt Dep. 123:23-127:14). NPBL proposed \$[REDACTED] per car. *See CSX Ex. 7* (Moss Dep. 175:12-177:18).

f. CSX’s 2018 Service & Governance Proposals

[Disputed: NS SOF ¶¶ 58-62; NPBL SOF ¶¶ 36-42]

62. On March 23, 2018, CSX sent NPBL management a Rate Proposal for Long Term Rail Service to NIT. *See* ECF No. 1-5 (“2018 Proposal”). CSX proposed a switch rate of \$80 per car, loaded or empty, for international intermodal containers moving to or from NIT, with a guaranteed minimum of 18,000 cars per year. *Id.* The 2018 Proposal presented NPBL a consistent, long-term, and substantial stream of income, as well as new revenue opportunities. *See id.*

63. NPBL Vice President Donna Coleman did a “back-of-the envelope financial evaluation” of the 2018 Proposal, which she discussed with President Cannon Moss. CSX Ex. 5 (Coleman Dep. 181:13-25); CSX Ex. 80 (NPBL000189 at -93). Her calculations showed net revenue for NPBL per trip under the proposal would be \$1,500, not including supervisor costs.

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Id.; see also **CSX Ex. 5** (Coleman Dep. 188:9-190:8). She concluded there was enough “validity” to send the proposal to a rate committee. **CSX Ex. 5** (Coleman Dep. 189:19-22).

64. On March 28, 2018, NS called an internal meeting to discuss CSX’s proposal, including how it would be impacted by NS’s “[REDACTED].” **CSX Ex. 81** (NSR_00051329). During this internal meeting, NS recognized that the “[REDACTED]” [REDACTED] [REDACTED] [REDACTED].” *Id.* (emphasis added); see also **CSX Ex. 82** (NPBL005881 at -882) (April 2016 email from NS’s Cheryl Jenkins, pressing NPBL’s Cannon Moss to execute trackage rights agreement including NS’s proposed trackage rights rate).

65. On April 3, 2018, NPBL personnel asked NS operations employees for permission to “[REDACTED]” **CSX Ex. 83** (NSR_00006321). NS reported internally: “[REDACTED]” [REDACTED].” *Id.* (emphasis added).

66. On April 5, 2018, NPBL’s Moss sent an email to CSX’s Tony DiDeo, outlining a few “thoughts” about the 2018 Proposal. **CSX Ex. 84** (NPBL006228). Moss noted, among other things, that the “major factor in play are the windows NS would provide for NPBL to make our run to NIT” (i.e., the request NS denied two days earlier). *Id.* Moss also noted that the proposal would “require” two NPBL locomotives (leased from NS), and that NPBL management “would recommend to the board for a rate committee to do a complete review of the tariff.” *Id.* Moss testified that, in addition to these purported concerns, he did not feel he could perform an in-depth analysis of CSX’s proposal until he knew what NPBL was “going to be paying [NS] for trackage rates.” **CSX Ex. 7** (Moss Dep. 244:2-8).

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67. On April 6, 2018, CSX sent a letter to NPBL and NS demanding remedial actions at the upcoming meetings of the NPBL Board and Shareholders, including affording CSX equal representation on the Board; adding qualified, independent directors to the Board; replacing members of NPBL management with qualified, independent individuals; and adopting a corporate compliance program independent of that adopted by NS. *See* ECF No. 1-6.

68. On April 16, 2018, CSX submitted a list of qualified candidates to serve as independent members of the NPBL Board of Directors, who CSX proposed be considered for election at the NPBL Shareholders meeting set for April 18. *See CSX Ex. 85* (CSXT0101908).

69. At the April 18 Shareholders' meeting, CSX proposed the governance changes outlined in its April 6 letter, and recommended interim officers be installed at NPBL until the transition was completed. *CSX Ex. 86* (CSXT0158238). The proposal failed when NS voted its 57% majority shares against it. *Id.*

70. One NS-appointed NPBL Board member conceded that several of CSX's requests for corporate governance changes were reasonable, but confirmed the Board ultimately took no action in response. *CSX Ex. 87* (Merilli Dep. 57:21-58:20); *CSX Ex. 88* (Hall Dep. 49:15-50:22).

71. At its April 18, 2018 meeting, the NPBL Board did not discuss the 2018 Proposal and did not vote to form a rate committee to analyze the tariff or the proposal. *CSX Ex. 89* (Hurlbut Dep. 67:23-68:16); *CSX Ex. 87* (Merilli Dep. 75:11-21). The CSX-appointed directors requested that the Board appoint an independent committee to review and evaluate the 2018 Proposal, but the NS-appointed directors refused, based on purported "conflicts" with NPBL's governing documents. *CSX Ex. 90* (CSXT0142657 at -659); *but see CSX Ex. 5* (Coleman Dep. 110:6-15) (Coleman testifying that NPBL rate committees were "ad hoc" and "anybody" could be appointed); *see also CSX Ex. 37* (Armbrust Dep. 246:8-21) ("I understood the rate committee to

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be essentially a farce to reject [CSXT's] proposal."); *id.* at 254:18-255:4 (only a committee of "independent experts" would be reasonable, based on his experience as an NPBL director).

III. NPBL's \$210 Switch Rate is Preclusive and Exclusionary

[Disputed: NSR SOF ¶¶ 8, 45, 47, 52, 67; NPBL SOF ¶¶ 23-24, 43-51]

72. The Belt Line's \$210 switching rate is substantially higher than rates charged by other terminal switching railroads for similar services.¹⁴ *See CSX Ex. 53* (Girardot Decl. ¶ 2). The most obvious comparison is CWRV, which provides terminal switching services to NS and CSX at VIG. *See NS SOF ¶ 10; NPBL SOF ¶¶ 11-13.* In 2009, CWRV charged CSX [REDACTED] per container for switching services—nearly [REDACTED] times less than NPBL's \$210 per well rate. *See NS Ex. 71 ¶ 60.* Today, NPBL's rate remains nearly [REDACTED] as high as CWRV's, even when accounting for the ability to "double-stack" containers.¹⁵ *See id.* at ¶ 62. NPBL's \$210 per well rate is also significantly higher than the rates charged by terminal switching railroads handling intermodal traffic at other East Coast ports, which generally range from \$[REDACTED] to \$[REDACTED] per container. *See CSX Ex. 53* (Girardot Decl. ¶¶ 2-4); *see also NS Ex. 7 ¶ 54; NS Ex. 71 ¶ 64.* NPBL's and NS's own documents confirm that the \$210 rate is high. *See CSX Ex. 30* (NSR_00011118 at -119); *CSX Ex. 68* (Luebbers Dep. 186:9-191:11) (acknowledging the NPBL switch rate was already

¹⁴ NPBL cites CSX's John Booth's testimony that NPBL's \$210 rate was "not unusual." NPBL SOF ¶ 23. As Booth explained, however, "switch charges can vary significantly." NPBL Ex. 20 at 141:22. Switch rates can also vary by commodity, and the economics of some commodities are that they can support a higher switch rate than intermodal. *See CSX SOF ¶ 75.*

¹⁵ "Double-stacking" refers to the ability to load more than one container on a railcar. NS SOF ¶ 7. CSX gained "double-stack" capabilities at POV in December 2016. *See NS Ex. 5* at 217:5-12. NPBL suggests a double-stacked railroad "common[ly]" loads "two or three" containers in a single well. *See NPBL SOF ¶¶ 50-51.* But the record reflects that a variety of factors limit the number of containers loaded per well, and that CSX averages [REDACTED] per well under normal operating circumstances. *See CSX Ex. 11* (2d Girardot Decl.) ¶¶ 3-4; *CSX Ex. 12* (Girardot 2d Dep. 101:5-17, 109:23-110:8); *see also NS Ex. 71 ¶¶ 61-62.* Thus, contrary to NS's suggestion, double-stacking does not "double" train capacity. *See NS SOF ¶ 8.*

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“[REDACTED]” before the Board raised it to \$210 in 2009); **CSX Ex. 19** (NSR_00027070 at - 074) (notes reflecting that NPBL’s Coleman stated that the \$[REDACTED] per car rate proposed by NPBL management in 2009 was “in line” with rates charged by other switching railroads).

73. In trying to recast its rate as reasonable, NPBL suggests the “industry standard” for evaluating rail rates is on a “per mile” basis.¹⁶ NPBL SOF ¶ 46 (citing NPBL Ex. 3). But NPBL’s expert, Thomas Crowley, does not describe his “per mile” methodology as “industry standard,” much less cite any industry publications or other authorities supporting that conclusion. *See* NPBL Ex. 3 at 12. At his deposition, Mr. Crowley testified only that this was an “acceptable” method. *See* NPBL Ex. 32 at 235:7-15. And, as NPBL’s Donna Coleman testified, [REDACTED] [REDACTED].” **CSX Ex. 5** (Coleman Dep. 187:12-19); *see also* **CSX Ex. 11** (2d Girardot Decl.) ¶ 6.

74. Defendants contend the Belt Line’s rate was established to cover its operating costs, based on NPBL’s purported “per car” expenses between 2010 and 2020. *See* NS SOF ¶¶ 48-50; NPBL ¶¶ 44-45 (both citing NPBL Ex. 3 at 5-6 & Tbl. 1). NPBL’s cost analysis makes no attempt to distinguish between fixed and variable costs, or to consider that its operating expenses per car would decrease as the number of cars handled increased. *See* **CSX Ex. 7** (Moss Dep. 238:10-14) (agreeing that operating expenses per car would decrease as traffic increased); *see also* **CSX Ex. 5** (Coleman Dep. 104:9-18) (a “unit train” usually “costs less” than other moves); **CSX Ex. 91** (CSX Corporate Dep. 100:18-106:4) (discussing difference between fixed and variable costs). Contemporaneous analyses from both CSX and NPBL reflect that NPBL would cover its costs and gain new revenue if it charged a more competitive rate for intermodal traffic. *See* CSX SOF ¶¶

¹⁶ NS, for its part, suggests NPBL’s rate is governed by the Surface Transportation Board (“STB”). *See* NS SOF ¶ 45. This is an argument as to the law, not a statement of fact. And, as this Court has already held, STB jurisdiction does not prevent CSX’s claims. *See* ECF No. 66 at 20.

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30-31 (2010 Proposal); CSX SOF ¶¶ 62-63 (2018 Proposal); *see also* NS Ex. 71 ¶¶ 57-58.

75. CSX has paid NPBL's \$210 tariff rate to move "carload" or "dimensional" traffic. *See* NS SOF ¶ 67; NPBL SOF ¶ 24; *see also* CSX Ex. 7 (Moss Dep. 125:15-126:10). Comparing carload or dimensional freight to intermodal container traffic is "apples to oranges," however, because the markets for these commodities are different. CSX Ex. 7 (Moss Dep. 225:23-25); CSX Ex. 91 (CSX Corporate Dep. 158:15-160:17). NPBL could offer a reduced rate for intermodal traffic without lowering the switch rate applicable to other types of traffic. *See* CSX Ex. 91.

IV. The International Intermodal Transportation Market

[Disputed: NS SOF ¶¶ 21-25]

76. CSX and NS compete for international intermodal shipping contracts. NS SOF ¶ 5. Ocean carriers shipping containers of goods to and from the United States enter into multi-year contracts with a single railroad, under which that railroad handles the vast majority of rail movements for that carrier across a geographic portfolio (e.g., all containers moving by rail to and from East Coast ports). *See* CSX Ex. 92 (Joyner Dep. 42:1-44:11, 63:10-18); CSX Ex. 93 (Heller Dep. 38:13-39:20); CSX Ex. 94 (Warren Decl. ¶ 4); *see also* NS Ex. 7 ¶¶ 27-30. Each of these contracts is worth tens—if not hundreds—of millions of dollars.¹⁷ *See, e.g.,* CSX Ex. 95 (NSR_00128851 at -876).

77. Ocean carriers issue Requests for Proposals ("RFPs") to CSX and NS, identifying a volume of international intermodal containers to be moved by rail in particular "lanes" (i.e., port to destination pairs). *See* CSX Ex. 92 (Joyner Dep. 43:9-45:4); CSX Ex. 96 (Strongosky Dep. 77:9-78:18); CSX Ex. 97 (CSXT0050597) (2016 [REDACTED] RFP); *see also* NS Ex. 7 ¶ 31.

¹⁷ CSX and NS also compete for *domestic* intermodal business, which involves transportation of cargo between two points within the United States. *See* NS Ex. 10 ¶ 21. Domestic intermodal business is not at issue in this case. *See id.*

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78. Ocean carriers' decisions about which ports to call depend on a variety of factors, including [REDACTED]. See CSX Ex. 93 (Heller Dep. 245:5-246:14). Vessel routing also depends in large part on ocean carrier alliances, in which multiple carriers agree to share a single vessel to reduce costs and increase efficiency. See NS Ex. 7 ¶¶ 36; NS Ex. 71 ¶¶ 80-81.

79. Although *ports* may compete for "discretionary cargo" (NS SOF ¶¶ 21-25), this is not relevant to the question of whether *railroads* can direct which port an ocean carrier selects to unload their goods. See CSX Ex. 94 (Warren Decl. ¶¶ 3-7); see also NS Ex. 7 ¶¶ 22, 32-36; NS Ex. 47 at -487 ("[REDACTED]"). As NS's Jeff Heller testified, [REDACTED] [REDACTED].¹⁸ See CSX Ex. 93 (Heller Dep. 245:5-246:14); see also CSX Ex. 98 (Piacente Dep. 45:22-46:17); NS Ex. 71 ¶¶ 45-54. NS's and CSX's data confirm that ocean carriers move international intermodal containers to and from the same inland destinations through multiple ports. See NS Ex. 71 ¶ 50-54 & Exs. 3 & 4.

¹⁸ NS describes in detail competition among *ports* for international intermodal business, see NS SOF ¶¶ 21-24, 26-27, 32, and states that CSX and NS "consider how pricing affects an ocean carrier's decision to call at various ports," *id.* ¶ 25. But competition among *ports* does not affect whether *railroads* can influence ocean carriers' routing decisions. The evidence cited by NS reflects that port costs and characteristics—not rail rates or routes—influence these choices. See, e.g., NS Ex. 46 at -388 (noting carrier might shift traffic to Norfolk to "[REDACTED]"); CSX Ex. 99 (Warren Dep. 111:5-113:10) (confirming this statement pertains to port charges, not rail rates). None of the cited evidence suggests that an ocean carrier has ever diverted international intermodal freight based on rail rates or routes alone. See NS Ex. 48 at -305, -309 [REDACTED].

[REDACTED]; NS Ex. 51 at -162 ([REDACTED]); NS Ex. 52 [REDACTED]; NS Ex. 49 [REDACTED]; see also CSX Ex. 12 (Girardot 2d Dep. 59:4-62:12) ([REDACTED]).

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83. Drayage is an expensive and inefficient alternative to on-dock rail, especially at high-volume terminals like NIT. *See CSX Ex. 53* (Girardot Decl. ¶ 5); *CSX Ex. 94* (Warren Decl. ¶ 9); *CSX Ex. 96* (Strongosky Dep. 37:6-12); *CSX Ex. 92* (Joyner Dep. 31:23-33:12, 79:24-80:1) (NS “ [REDACTED]); *CSX Ex. 102* (Martinez Dep. 56:13-57:20) (on-dock rail is less expensive and more efficient); *CSX Ex. 105* (NSR_00122609) (NS describing on-dock at NIT as “ [REDACTED]); *CSX Ex. 106* (C. Booth Dep. 59:19-65:6) (due to rail’s efficiency, drayage is typically used only if on-dock rail is unavailable).¹⁹ Drayage adds “ [REDACTED] ” to container transit times. *CSX Ex. 13* (Capozzi Dep. 239:16-240:11).

84. Drayage is a particularly problematic at NIT. The drayage route between NIT and CSXT’s Portsmouth yard follows Hampton Boulevard, a four-lane local road passing directly in front of the Old Dominion University campus. *See NS Ex. 7* ¶ 45 & *Ex. 7*. Local regulations prohibit trucks on Hampton Blvd. “between the hours of 4:00 p.m. and 6:00 a.m.” Norfolk Municipal Code § 25-262. Street congestion, gate delays, and the limited availability of truckers and chassis also limit the efficiency and reliability of drayage. *See CSX Ex. 108* (Wagel Dep. 42:8-21, 46:18-22); *CSX Ex. 109* (J. Booth Dep. 81:21-82:12); *CSX Ex. 104* (VPA Corporate Rep. Dep. 67:4-68:6).

85. VIT coordinates drayage at NIT and other POV terminals. *See CSX Ex. 13*

¹⁹ In limited circumstances, NS and CSX use drayage at terminals where they have on-dock access. *See, e.g., CSX Ex. 107* (McClellan Dep. 72:13-22) (describing NS’s use of drayage in Jacksonville). NS does not view drayage as inferior in these locations, because the volume of containers handled is small. *See CSX Ex. 92* (Joyner Dep. 72:13-22); *see also CSX Ex. 69* (Kenney Dep. 69:22-70:9) (describing low volumes and straightforward drayage route in Jacksonville); *CSX Ex. 11* (Girardot 2d Decl. ¶ 9).

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(Capozzi Dep. 122:14-15). [REDACTED].²⁰ See

CSX Ex. 13 (Capozzi Dep. 79:16-80:18). [REDACTED]

[REDACTED]. See CSX Ex. 13 (Capozzi Dep. 241:8-15). [REDACTED]

[REDACTED]. See NS Ex. 71 ¶¶ 34-35.

86. Ocean carriers express a strong preference for on-dock rail and “view drayage as a significantly inferior option.” CSX Ex. 94 (Warren Decl. ¶ 10) (former CSX executive explaining he “ [REDACTED]

[REDACTED].”); see also

CSX Ex. 96 (Strongosky Dep. 37:6-12); CSX Ex. 13 (Capozzi Dep. 76:16-78:15); CSX Ex. 110 (NSR_00157631 at -631) ([REDACTED]

[REDACTED]); CSX Ex. 111 (Heller 2d Dep. 25:20-27:6)

([REDACTED] ”); CSX Ex. 112 (CSXT0136053) ([REDACTED]

[REDACTED]]”).

87. NS aggressively protects its reputation as the sole provider of on-dock rail access at NIT. See, e.g., CSX Ex. 113 (NSR_00027097) (“ [REDACTED]

[REDACTED].”);

²⁰ NPBL’s suggestion that its rate is “[REDACTED],” see NPBL SOF ¶ 52, ignores the many non-monetary obstacles imposed by Defendants on CSX’s attempts to use NPBL to access NIT, see CSX SOF ¶¶ 43-44, 46-49, 51-54.

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CSX Ex. 114 (NSR_00027098) (“[REDACTED]
[REDACTED].”).

88. CSX’s lack of on-dock rail access at NIT has driven multiple ocean carriers to contract with NS rather than CSX, including in each of 2015, 2016, 2017, and 2019. *See* CSX Ex. 69 (Kenney Dep. 20:8-21:4, 31:6-11) ([REDACTED]); CSX Ex. 94 (Warren Decl. ¶ 11) ([REDACTED] & [REDACTED]); CSX Ex. 99 (Warren Dep. 162:22-163:12) ([REDACTED]); CSX Ex. 115 (CSXT0096961 at -963) ([REDACTED]); CSX Ex. 53 (Girardot Decl. ¶ 8) ([REDACTED] & [REDACTED]); CSX Ex. 55 (Girardot Dep. 233:24-234:18; 271:13-272:12); CSX Ex. 116 (CSXT0013901) (account notes indicating, with respect to [REDACTED] proposal, [REDACTED]
[REDACTED]). Ultimately, CSX’s lack of on-dock access at NIT has reduced its market share across the entire East Coast. *See* CSX Ex. 117 (Eliasson Dep. 40:12-41:10).

b. Other Terminals are Not Adequate Substitutes for On-Dock Rail at NIT
[Disputed: NS SOF ¶¶ 9-12, 19, 20, 26-32, 69; NPBL SOF ¶ 9]

89. NIT is the largest and most important marine terminal at the Port of Virginia. *See* NS Ex. 10 ¶ 32. It has six berths, the largest number of any POV terminal. It is accessible by a 50-foot navigation channel and can accommodate the largest modern Post-Panamax class vessels. *See* CSX Ex. 13 (Capozzi Dep. 95:18-24).

90. A second terminal, VIG, is located across the Elizabeth River from NIT. Although a recent expansion increased VIG’s annual throughput capacity to approximately 1.2 million containers (*see* NSR SOF ¶ 10), a level similar to NIT’s, VIG remains more constrained because it has only three berths—half the number at NIT. *See* NS Ex. 71 ¶¶ 83-84; CSX Ex. 13 (Capozzi Dep. 95:25-96:12). Both CSX and NS access on-dock rail at VIG via CWRY. *See* CSX SOF ¶ 72.

91. A third terminal, Portsmouth Marine Terminal (“PMT”), is smaller and cannot accommodate the largest modern container ships. *See* NS Ex. 71 ¶ 88. PMT was closed from 2010

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to 2013, but reopened in 2014 to handle “overflow” traffic while expansion efforts were underway at VIG and NIT. *See CSX Ex. 13* (Capozzi Dep. 172:23-173:19) (PMT was a “[REDACTED]”); *CSX Ex. 55* (Girardot Dep. 159:24) (PMT was an “emergency workaround Band-Aid”). PMT was closed again in 2018, and VIT has no plans to re-open it for container cargo. *See CSX Ex. 13* (Capozzi Dep. 172:23-173:19). When operational, PMT could handle only between [REDACTED] and [REDACTED] containers annually—a tiny fraction of VIG or NIT. *See NS Ex. 10* ¶ 116; *NS Ex. 71* ¶¶ 85-90. NS and CSX both had access to on-dock rail at PMT. *See NS SOF* ¶¶ 11-12.

92. VIT determines at which terminal a vessel will call. *See NS SOF* ¶ 19; *CSX Ex. 13* (Capozzi Dep. 91:14-93:7; 94:12-104:19). In making this decision, the most important factor considered is [REDACTED], followed by [REDACTED]. *See id.* at 91:25-93:7. After those factors, VIT considers [REDACTED]. *See id.* at 99:23-100:11. [REDACTED]. *See id.* at 193:10-17; *see also CSX Ex. 94* (Warren Decl. ¶ 5) ([REDACTED]); *NS Ex. 71* ¶¶ 70-72. VIT retains discretion to [REDACTED]. *See CSX Ex. 13* (Capozzi Dep. 101:12-13; 243:15-24); *CSX Ex. 69* (Kenney Dep. 29:2-8).

93. Although VIT has expressed a desire to steer CSX-aligned containers to VIG, the empirical data show that ocean carrier volumes do not shift from NIT to VIG following a change in alignment from NS to CSX. *See NS Ex. 71* ¶¶ 77-79 & Ex. 5; *see also CSX Ex. 13* (Capozzi Dep. 182:15-185:23; 243:15-24) (VIT’s Capozzi explaining it is “[REDACTED]”).

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[REDACTED], *see* CSX SOF ¶¶ 78, 92).

94. NS suggests that no international intermodal traffic or customer “must” move through NIT, *see* NS SOF ¶ 69; however, the volume of containers moved through NIT each year could not realistically be shifted to other POV terminals, or to marine terminals at other ports, like the Port of NY/NJ. *See* NS Ex. 71 ¶¶ 50-54, 70-76, 80-81.

c. Trucks Do Not Compete with Rail for International Intermodal Freight
[Disputed: NS SOF ¶¶ 36-41]

95. NS states that 60-65% of international intermodal containers at POV were moved by truck between 2012 and 2019. *See* NS SOF ¶ 36. This statistic does not distinguish between containers destined for local markets, which necessarily move by truck, and those traveling longer distances, which move by rail. *See* CSX Ex. 69 (Kenney Dep. 44:9-45:14). VIT’s Tom Capozzi confirmed that [REDACTED]. *See* CSX Ex. 13 (Capozzi Dep. 164:25-166:2). This is a “[REDACTED].” *Id.*

96. Trucking is a “very minor consideration” in competition for international intermodal cargo traveling more than 200 to 500 miles. *See* CSX Ex. 98 (Piacente Dep. 64:2-16, 86:7-87:8) (200 miles); CSX Ex. 99 (Warren Dep. 72:10-73:23) (150 to 200 miles); CSX Ex. 104 (VPA Corporate Rep. Dep. 48:7-50:5) (100 to 140 miles); CSX Ex. 55 (Girardot Dep. 60:16-61:15) (150 to 400 miles); CSX Ex. 96 (Strongosky Dep. 112:16-24) (500 miles); CSX Ex. 107 (McClellan Dep. 71:24-72:1) (500 miles); CSX Ex. 92 (Joyner Dep. 19:7-20:9) (500 miles).

97. Although NS suggests that “at least some” international intermodal rail rates are set “to remain competitive with trucks,” NS SOF ¶ 40, the documents cited involve moves of less than 500 miles. *See* NS Ex. 40 (discussing rate from New York to Pittsburgh, less than 400 miles); NS

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Ex. 72 (discussing rate from Jacksonville to Eden, N.C., less than 500 miles); NS Ex. 77 (discussing rate from Port of New York/New Jersey to Syracuse, less than 250 miles). The Midwest destinations competitively served by NS and CSX are farther than 500 miles from POV. *See* NS Ex. 10 Tbl. 1.

98. Contrary to NS's suggestion (NS SOF ¶ 41), CSX's Highway to Rail ("H2R") program primarily targeted converting *domestic* intermodal container volumes from truck to rail. *See* CSX Ex. 69 (Kenney Dep. 65:6-12); *see also* NS Ex. 71 ¶¶ 40-41 (explaining differences between international and domestic intermodal competition).

V. Harm to Competition and Damage to CSX

[Disputed: NS SOF ¶¶ 33-35, 70-71]

99. CSX vigorously competes for international intermodal business at all major ports on the East Coast, including the Port of Virginia. *See* NS SOF ¶ 5. Although CSX's container volumes at POV have increased since 2009, *see* NS SOF ¶¶ 70-71, this expansion is almost entirely concentrated at VIG, where CSX has access to on-dock rail, *see* NS Ex. 71 ¶¶ 109-118.²¹

100. As John Reinhart, the CEO and Executive Director of the Virginia Port Authority ("VPA"), emphasized in a letter to NPBL President Cannon Moss, "[REDACTED]
[REDACTED]
[REDACTED]. *See* CSX Ex. 118 (CSXT0100756). Reinhart "[REDACTED]
[REDACTED]
[REDACTED]" *Id.*; *see also* CSX Ex. 54 at 21-26.

101. As CSX's expert, Dr. Howard P. Marvel, Dr. Howard P. Marvel—an economics

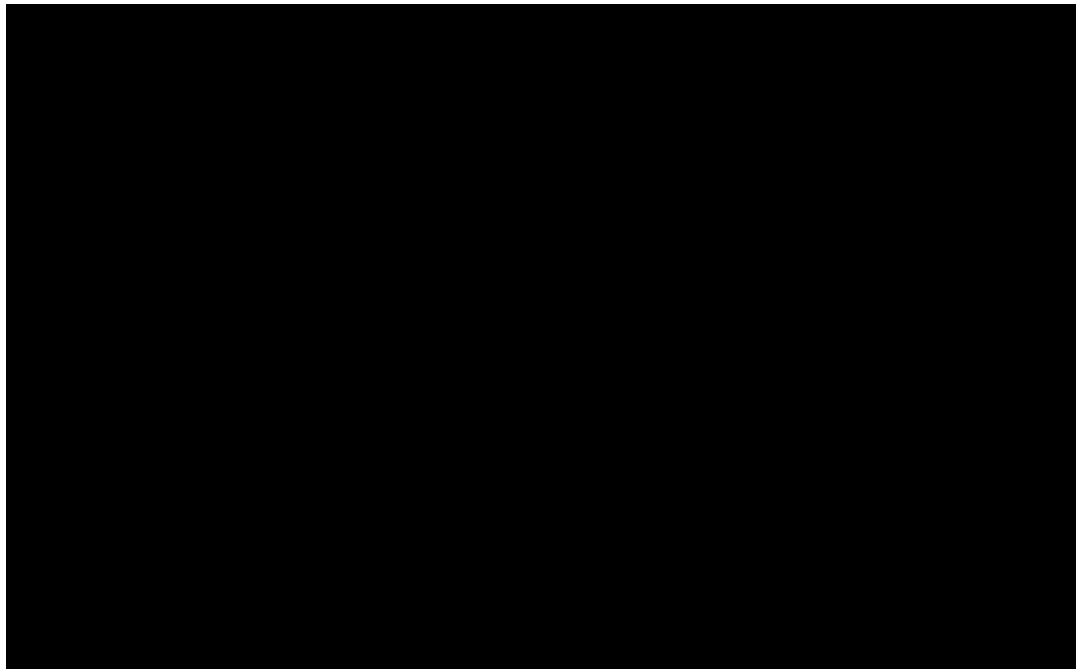
²¹ NS points to completion of CSX's National Gateway Project in 2016, and certain purported service disruptions in 2019, to suggest CSX has a "competitive disadvantage" at POV. *See* NS SOF ¶¶ 33-35. The evidence makes clear, however, that CSX has competed vigorously at POV since at least 2009, and that it has had success, primarily at VIG. *See* NS Ex. 71 ¶¶ 109-119.

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professor with more than forty years' experience—has confirmed, the empirical data show that NS's and NPBL's conduct harms ocean carriers. Because CSX cannot effectively act as a competitive constraint on NS at NIT, NS charges higher prices to carriers who use NIT intensively. *See* NS Ex. 7 ¶¶ 69-81. [REDACTED]

[REDACTED]. *See id.* ¶ 81. And because ocean carriers contract with NS for multiple lanes across a large geographic portfolio, the reverberations of this overcharge extend throughout the network. *See id.*

102. Because ocean carrier RFPs cover multiple ports, CSX has lost substantial business across its entire network because of its lack of on-dock access at NIT. *See* CSX SOF ¶¶ 77-81, 86, 88. Dr. Marvel estimates that CSX's lost profits totaled more than \$ [REDACTED] million between 2009 and 2020:



See NS Ex. 71 ¶¶ 120-126 & Exs. 14 & 15; *see also* NS Ex. 7 ¶¶ 85-100.

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STANDARD OF REVIEW

The Court can grant summary judgment to Defendants only if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,” the Court may evaluate the evidence only as needed to determine whether there is “sufficient disagreement to require submission to a jury.” *McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2014). The Court should view all facts and permissible inferences from them in the light most favorable to CSX. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). If a reasonable jury could return a verdict for CSX, “then a genuine factual dispute exists and summary judgment is improper.” *Wright v. Va. Peninsula Regional Jail Auth.*, No. 2:19cv189, 2021 WL 963496 at *2 (E.D. Va. March 15, 2021) (Davis, C.J.).

ARGUMENT

I. CSX’s Claims are Timely.

Though Defendants do not acknowledge it, they bear the burden of proof on the affirmative defenses of the statute of limitations. *See Graham v. Island Creek Coal Co.*, 184 F. Supp. 2d 511, 515 (W.D. Va. 2002) (noting that defendants “bear the burden of proof on the issue of whether the plaintiff’s claims are barred by the statute of limitations,” and denying summary judgment where the record contained disputed evidence as to the date on which plaintiff’s injury occurred). The record does not support summary judgment on limitations grounds. As explained below, CSX alleges ongoing antitrust violations, which are timely so long as they continue into the limitations period, which CSX has shown. Accordingly these claims—including *all* evidence of Defendants’ ongoing anticompetitive conduct—must be submitted to a jury. The same is true for CSX’s state law claims, as detailed below.

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a. CSX's Sherman Act Claims are Timely (Counts I-IV).

Defendants' primary argument against CSX's antitrust claims is that they are barred by the applicable four-year statute of limitations. *See* NS Br. at 16-20; NPBL Br. at 15-21 (both citing 15 U.S.C. § 15b). Defendants contend that, because CSX did not sue within four years of their very first anticompetitive act, their ongoing monopoly and conspiracy are now unreachable, and they are free to block CSX's access to NIT, stifle competition, and overcharge ocean carriers in perpetuity with impunity.

Defendants' arguments misstate the law. Under the "continuing violation" doctrine—which NS only briefly acknowledges and NPBL ignores—"[t]he period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004). And, contrary to NS's suggestion, this principle applies equally to CSX's antitrust conspiracy *and* monopolization claims. *See id.* (explaining, in applying continuing violation doctrine to monopolization claim, that "improperly prolonging a monopoly is as much an offense against the Sherman Act as is wrongfully acquiring market power in the first place"). As the Fourth Circuit reaffirmed *just one day* after Defendants filed their motions, "'in the context of a continuing conspiracy to violate the antitrust laws,' the statute of limitations begins to run from 'each time a plaintiff is injured by an act of the defendants.'" *Mayor of Baltimore v. Actelion Pharms. Ltd.*, ___ F.3d ___, 2021 WL 1376980, at *6 (4th Cir. Apr. 13, 2021) (citing *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 401 U.S. 321, 338 (1971)); *see also United States v. Dentsply Int'l, Inc.*, No. Civ. A. 99-005, 2001 WL 624807, at *17 & n.18 (D. Del. Mar. 30, 2001), *aff'd sub nom. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (in Sherman Act monopoly case, denying motion for summary judgment based on the statute of

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limitations after concluding that a jury could find certain conduct sufficient to restart the statute of limitations under the continuing violation doctrine).

This is true even if “the acts occur[ing] within the limitations period were reaffirmations of decisions originally made outside the limitations period,” *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010), and even if the conduct at issue is “intentional, concerted *inaction*” rather than affirmative acts, *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993) (emphasis added). For example, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Supreme Court held that the plaintiff’s claims were timely, even though the defendant’s allegedly monopolistic leasing policy had been first adopted more than *forty years* before plaintiff sued. *See* 392 U.S. 481, 502 n.15 (1968). The Court explained: “We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm.” *Id.*

So too here. Although evidence produced in discovery shows that Defendants have engaged in anticompetitive and conspiratorial conduct for years, *see, e.g.*, CSX SOF ¶¶ 10, 17, the record contains ample evidence of overt acts and “intentional, concerted inaction” causing new injuries within the limitations period, *see, e.g., id.* ¶¶ 45-54 (operational challenges and CSX’s payment of \$210 rate in 2015), ¶¶ 56-61 (trackage rights); ¶¶ 62-71 (2018 proposal); *see also id.* ¶ 102 (injury to CSX).²² Each of these acts is enough to “start[] the statutory period running again” on CSX’s antitrust claims. *Actelion Pharms.*, 2021 WL 1376980, at *6.

²² Defendants take a stunted view of the evidence, suggesting that CSX has pointed to only six examples of wrongful conduct since 2009. *See* NS Br. at 16; NPBL Br. at 15 (citing CSX’s 2d Supp. Resp. to NPBL’s Interrog. No. 4). To be clear, the interrogatory cited by Defendants asked CSX to identify “the specific overt act(s) *by NPBL* that you contend form the basis for the conspiracy alleged in Counts I, II, VIII, and IX of your Complaint.” *See* NS Ex. 118 at 2 (emphasis

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None of the authority Defendants cite is to the contrary. First, *Klehr v. A.O. Smith Corp.*, actually *refutes* their arguments. There, the Supreme Court analyzed a RICO claim by analogizing to the Sherman Act, explaining that “in the case of a continuing violation . . . , each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff’s knowledge of the alleged illegality at much earlier times.” 521 U.S. 179, 189 (1997).²³ In other words, when a continuing violation includes conduct within the limitations period that causes injury, the plaintiff may bring claims based on that conduct, regardless of when the conduct began. *See W. Penn Allegheny Health*, 627 F.3d 85 at 107 (holding, after *Klehr*, that “*Hanover Shoe* and *Lower Lake Erie* leave no room for [Defendants’] proposed rule. . . . [P]laintiff’s suit was timely even though the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period.”).

The other cases cited by NS are inapposite. Both *Kaw Valley Electric Cooperative Co. v. Kansas Electric Power Cooperative, Inc.*, 872 F.2d 931, 933-35 (10th Cir. 1989), and *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986), held that the continuing violation doctrine did not apply because the plaintiff pointed to damages, but not *conduct*, within the limitations period. And in *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1275 (5th Cir.

added). It did not ask CSX to identify all wrongful conduct within the limitations period; nor did it ask for examples of action (or purposeful inaction) by NS. *See id.* at 2-3 (CSX’s response, clarifying that it is “in no way intended as an exhaustive list of overt acts committed by NS in furtherance of the conspiracy”). CSX’s response is thus not a catalogue of all evidence supporting its claims.

²³ In arguing that CSX’s antitrust claims are time-barred, NPBL suggests CSX “was aware of its alleged injuries” in 2009. *See* NPBL Br. at 16-17. The evidence cited by NPBL does not support this conclusion, particularly in light of Defendants’ repeated obfuscations during this period. *See* CSX SOF ¶¶ 18-41. Regardless, CSX’s knowledge is immaterial, since each act in furtherance of Defendants’ continuing violations restarts the limitations period on its claims, no matter what CSX knew or when. *See Klehr*, 521 U.S. at 189.

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1991), the court determined that the last overt act occurred *outside* the limitations period. Here, as discussed above, CSX has identified both conduct *and* damages within the limitations period.

NS contends that Defendants’ post-2014 conduct does not constitute “new and independent act[s]” that are “distinct from the ‘abatable but unabated inertial consequences’ of NPBL’s 2009 decision to set the switch rate at \$210.” NS Br. at 20. As the Fourth Circuit recently reiterated, however, in cases involving anticompetitive pricing, each sale constitutes a new injury restarting the limitations period. *See Actelion Pharms.*, 2021 WL 1376980, at *6. So even if the \$210 switch rate were the only conduct at issue—which it is not, as the Court has already recognized, *see* ECF No. 66 at 38-39—CSX’s payment of that anticompetitive rate in 2015 would suffice to restart the statute of limitations on its claims. But those payments are just one piece of CSX’s case—the record also contains plentiful evidence of Defendants’ obstruction of CSX’s efforts to access NIT via NPBL in 2015, NS’s cancellation of NPBL’s trackage rights and subsequent attempts to negotiate a prohibitively high rate between 2015 and 2018, and Defendants’ rejection of CSX’s 2018 service and governance proposals. All of these events constitute “new and independent” acts, distinct from the setting of the switch rate, that caused harm and thus restarted the statute of limitations.²⁴

NS claims “Defendants took *no overt action* on the 2018 Rate Proposal.” NS Br. at 19 (emphasis in original). But “overt action” for antitrust or conspiracy purposes need not be a formal Board vote denying CSX’s request. Rather, impeding, delaying and effectively denying through inaction are all sufficient to restart the limitation period, whether those acts are characterized as

²⁴ For this reason, NS’s citation to *XY, LLC v. Trans-Ova Genetics* is inapposite. In that case, the Federal Circuit affirmed summary judgment on limitations grounds because the plaintiff failed to identify *any* “new and accumulating” injury within the limitations period resulting from the alleged conspiracy. *See* 890 F.3d 1282, 1292 (Fed. Cir. 2018).

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actions to impede or *purposeful inaction*. See *Lower Lake Erie*, 998 F.2d at 1172 (explaining that “continuing and accumulating damage may result from intentional, concerted inaction. The purposeful nature of the inaction . . . obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense”). It is undisputed that, pursuant to its charter, NPBL exists to connect its owner railroads to destinations on its network, including NIT. Barring Defendants’ anticompetitive conduct, NPBL would have acted to facilitate CSX’s access to NIT, as it has facilitated CSX’s and NS’s access to other points. By refusing to take action on CSX’s proposals—which would have furthered NPBL’s stated purpose and benefitted NPBL financially—Defendants actively blocked CSX’s access to NIT, thus engaging in the very anticompetitive activity reflected in the record.

Most critically, NS’s arguments underscore the many material disputes of fact at issue. Compare NS Br. at 19 (arguing CSX “successfully used NPBL to access NIT in 2015”) with CSX SOF ¶¶ 46-49, 51-53 (describing substantial, unreasonable barriers imposed on CSX’s access in 2015); NS Br. at 19 (arguing “Defendants took *no overt* action” on 2018 Proposal) with CSX SOF ¶¶ 64-71 (describing actions by NS and NPBL directors and management to prevent fair consideration of the 2018 Proposal); NS Br. at 19-20 (arguing that NS “had the contractual right” to reject CSX’s Governance Proposal) with CSX SOF ¶ 2 & *infra* at 69-70 (disputing NS’s interpretation of the relevant agreements). These factual disputes preclude summary judgment.²⁵

²⁵ To the extent that Defendants suggest that *evidence* of pre-2014 conduct is not admissible to support CSX’s claims, that argument fails. The trier of fact may consider all evidence of Defendants’ continuing violations. See, e.g., *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 37-38 (S.D.N.Y. 2016) (“[A] monopoly which is ‘maintained’ during the damages period would need to be created before the damages period, and anticompetitive conduct before the limitations period may be material to a showing that Plaintiffs were injured during the damages period.”).

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b. CSX's State-Law Claims are Timely (Counts V, VIII, IX).

Defendants also contend that CSX's state law claims are time-barred, *see* NS Br. at 17-18; NPBL Br. at 17-18, but these arguments likewise miss the mark. The statute of limitations on CSX's state law claims is five years.²⁶ *See* ECF No. 66 at 36; NS Br. at 17; NPBL Br. at 17. The limitations period begins to run when a cause of action accrues. *See Forest Lakes Community Ass'n, Inc. v. United Land Corp. of Am.*, 795 S.E.2d 875, 881 (Va. 2017). Although a cause of action for property damage accrues when the damage is first incurred, "[i]t is possible for a new cause of action to accrue that looks remarkably like an earlier one but is nonetheless a stand-alone claim in its own right." *Id.* In such cases, "the damage accompanying the new cause of action sets new accrual starting blocks for a separate limitation period." *Id.*

Whether there is a single conspiracy or multiple conspiracies is a factual question. Indeed, because analysis of the "accrual starting blocks" in each case "depends so heavily on the factual context," it "def[ies] any attempts at formulaic applications." *Id.* at 881-82. Put differently, "[w]hether the evidence establishes a single conspiracy or multiple conspiracies is an issue for the jury." *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988); *accord In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18md2836, 2019 WL 6977405, at *4 (E.D. Va. Dec. 20, 2019); *Williams v. Commonwealth*, 407 S.E.2d 319, 322 (Va. Ct. App. 1991).

The record certainly contains facts from which a reasonable jury could find that Defendants engaged in a single, ongoing conspiracy throughout the relevant time period. *See, e.g., supra* at 42-46. But there are also facts in the record from which a jury could conclude that Defendants'

²⁶ NS suggests that CSX's common law conspiracy claim is subject to a two-year statute of limitations, based on its misguided assumption that the only "wrongful act" underlying that claim is breach of fiduciary duty. *See* NS Br. at 17 & n.4. As explained below, however, CSX's state law conspiracy claims rely on multiple wrongful and unlawful acts, including Defendants' violations of federal antitrust law, in addition to individual directors' violations of fiduciary duties.

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entered into a new conspiracy within the limitations period, as this Court outlined in denying Defendants' motions to dismiss:

[I]n 2018, Defendants entered into a new agreement to increase the amount Belt Line pays to NS to access NS's tracks to NIT. . . . Any increase in the price that [NS] charges Belt Line would, in turn, be passed on to Belt Line's customers. That is, it would lead to an increase in the Uniform Rate. The Court concludes that Plaintiff has alleged a *new conspiracy* within the statute of limitations period; this second attempt to raise the Uniform Rate is not a continuation of the same conspiracy to set the Uniform Rate at the [2009] level because the price is again increased.

ECF No. 66 at 39-40 (emphasis added). CSX is entitled to proceed on alternate theories of liability at trial when both are supported by the record. *See, e.g., Davis v. Richmond, Fredericksburg and Potomac R. Co.*, 803 F.2d 1322, 1327 (4th Cir. 1986) (affirming district court's decision to allow plaintiffs to proceed on two alternate theories of Title VII liability at trial). Whether there was one or more conspiracies is a factual matter for the jury to find.

In an attempt to discount this evidence, NPBL cites CSX's admission that "NPBL and NS did not enter a new agreement in 2018 to increase the amount NPBL pays NS to access NS's tracks to NIT." *See* NPBL Br. at 21-22; *see also* NPBL Ex. 28. But the fact that NS and NPBL have not executed a new trackage rights agreement is beside the point. To the contrary, as CSX alleged—and as the evidence now shows—Defendants have used their purported "dispute" over trackage rights as pretext to justify NPBL's artificially high rate and to reject CSX's proposal seeking a commercially reasonable rate. *See* CSX SOF ¶¶ 56-61. It was not necessary for Defendants to actually *agree* on a higher rate for their scheme to work, as they were able to delay and deny CSX's proposal based on the purported uncertainty surrounding this issue alone. And these actions—among others—constitute breaches of the NPBL Operating Agreement by NS occurring within the applicable limitations period. *See infra* at 69-70.

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Because all of this evidence falls within the applicable limitations period, CSX's state law claims are timely. At a minimum, the Court cannot resolve these factual issues on summary judgment. *Lozano*, 839 F.2d at 1023.

c. CSX's Damages Calculation Methodology Does Not Govern Accrual.

In trying to show that CSX's claims are time-barred, Defendants point to CSX's damages calculation methodology, which they criticize, based on a total of two federal decisions, as not "apportion[ing] damages between any separate unlawful acts." NPBL Br. at 18-19; *see also* NS Br. at 18-19. To be sure, CSX's expert, Dr. Howard Marvel, calculated profits CSX lost due to "the totality of NS's and NPBL's efforts to foreclose CSX" from on-dock rail at NIT. *See* CSX SOF ¶ 102. Most of these occurred in years *after* 2013—within the limitations periods. *See id.*

Defendants' argument that CSX must tie its damages calculation to specific overt acts "obfuscates the difference between, on the one hand, an 'overt act' necessary to show the existence of a conspiracy, and, on the other hand, an 'injurious act' causing damages within the limitations period." *Lower Lake Erie*, 998 F.2d at 1172. Although a plaintiff must identify at least one timely overt act causing injury in order to satisfy the statute of limitations, *Zenith Radio Corp.*, 401 U.S. at 338, its damages calculations need not be tied to that act, because "overt acts aren't what cause damage. *It is the effectiveness of the overall conspiracy that causes damages.*" *Lower Lake Erie*, 998 F.2d at 1172 (emphasis added).

Particularly in monopoly cases like this one, "the relevant inquiry is the anticompetitive effect of [Defendants'] exclusionary practices considered together." *LePage's v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003); *see also City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."). Thus, once the jury finds that

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Defendants' unlawful conduct injured CSX, "damages may be determined without strict proof of what act caused the injury, as long as the damages are not based on speculation or guesswork." *3M*, 324 F.3d at 166; *see also Dial Corp.*, 165 F. Supp. 3d at 38 (in monopoly case, rejecting summary judgment argument that plaintiff's damages model did not "sort out the effects of any particular form of anticompetitive conduct," explaining that "calculating damages in antitrust cases is not an exact science," and that "if a jury were to find [defendant's] actions taken as a whole to be a violation of Section Two of the Sherman Act, disaggregating the monopolist's lawful actions from its unlawful actions for the purpose of calculating damages may be unnecessary, if not impossible"); *Poster Exch'g, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 125 (5th Cir. 1975) (approving "day by day calculation of accruing injury" in monopoly and conspiracy case "based on continuing antitrust behavior, not merely the continuing damage [plaintiff] feels from a single day's monopoly and refusal to deal").

The same is true of CSX's state law conspiracy claims. The Fourth Circuit has recognized that, under Virginia law, damages result from the totality of a conspiracy, not any particular overt act. *See Blackwelder v. Millman*, 522 F.2d 766, 776 (4th Cir. 1975) (reversing summary judgment where damages resulting from conspiracy continued into limitations period); *see also Com. Bus. Sys., Inc. v. Bellsouth Servs., Inc.*, 453 S.E.2d 261, 267 (Va. 1995) ("Whether a conspiracy caused the alleged damage ordinarily is a question for a jury."). None of the cases cited by NPBL suggest otherwise. *See* NPBL Br. at 19-20 (citing *Gallop v. Sharp*, 19 S.E.2d 84, 86 (Va. 1942) (providing only that "the damage produced must arise as the effective result of the conspiracy")).²⁷

²⁷ The other Virginia cases cited by NPBL do not involve conspiracy claims. *See Street v. Consumers Mining Corp.*, 39 S.E.2d 271 (Va. 1946) (trespass); *Louisville & N.R. Co. v. Saltzer*, 144 S.E. 456 (Va. 1928) (negligence).

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NPBL contends that this Court's decision denying Defendants' motions to dismiss provided a "roadmap" for CSX's calculation of damages. *See* NPBL Br. at 20-21 (citing ECF No. 66 at 38-39). But this Court explained that CSX's damages would arise from profits lost as a result of Defendants' ongoing anticompetitive and conspiratorial conduct. *See* ECF No. 66 at 38. It did not suggest, at the motion to dismiss phase of the case, that CSX must apportion those lost profits by contract or tie them to any singular overt act. *See id.* NPBL's argument to the contrary misunderstands the facts of the case. CSX's lost profits are not limited to the marginal difference between the switch rate proposed by CSX and the rate charged by NPBL; they are the profits lost as a result of ocean carriers choosing not to contract with CSX due to its inability to access on-dock rail at NIT, as a result of the totality of Defendants' anticompetitive and conspiratorial conduct. Indeed, that is the consequence of the Defendants' conspiracy: CSX cannot effectively access NIT via NPBL and has lost business and profits due to that constraint. The record contains evidence of this lost business, *see id.* ¶ 88, and CSX's expert, Dr. Marvel, has calculated CSX's lost profits by year, *see id.* at ¶ 102. Neither Defendant challenges Dr. Marvel's damages calculation methodology.

The record contains ample evidence of overt acts by Defendants during the limitations period. The quantum or method for calculating damages arising from the totality of Defendants' conduct does not affect the timeliness of CSX's claims.

II. There is Ample Evidence Supporting CSX's Conspiracy Claims (Counts I, II, VII, IX).

CSXT has asserted four conspiracy claims against Defendants. *See* ECF No. 1 ¶¶ 77-84 (conspiracy to restrain trade in violation of Sherman Act § 1); *id.* ¶¶ 85-90 (conspiracy to monopolize in violation of Sherman Act § 2); *id. id.* ¶¶ 101-121 (statutory business conspiracy under Va. Code § 18.2-499, -500); *id.* ¶¶ 122-125 (Virginia common law conspiracy). Although

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these claims differ somewhat, Defendants challenge three overlapping elements: (1) whether there is evidence of an agreement; (2) whether there is evidence of overt acts in furtherance of the conspiracy; and (3) for CSX's state law claims, whether there is evidence of a wrongful act or tort. These challenges fail, because the record contains evidence supporting all three elements.

a. The Record Contains Substantial Evidence of Agreement and Overt Acts.

The parties agree that, to recover on its conspiracy claims, CSX must prove that an unlawful agreement existed between NS and NPBL,²⁸ and that an overt act was committed to further that agreement. *See* NS Br. at 33-35, 36-37; NPBL Br. at 22-30. To defeat summary judgment, CSX need only present evidence that can “reasonably lead to the inference that [Defendants] positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.” *Fed. Ins. Co. v. Locash*, No. 2:12cv504, 2014 WL 12588635, at *9 (E.D. Va. Feb. 18, 2014). CSX is entitled to rely on both direct and circumstantial evidence of conspiracy. *See Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 289-90 (4th Cir. 2012) (“Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence to suggest that an agreement took place.”).

The record amassed in discovery has no lack of conspiracy evidence, including:

- As early as 2002, NS's Chris Luebbers—an NS intermodal market manager—served on NPBL rate committees. NS does not use NPBL for intermodal switching at NIT, so Luebbers' only purpose is clear: to ensure CSX did not obtain favorable rates or any other potential advantages via NPBL. *See* CSX SOF ¶ 17.
- In 2009, NS-appointed rate committee members (including Luebbers) developed pretextual justifications to reject the [REDACTED] per car unit train rate, including raising concerns about supposed “ [REDACTED] ” [REDACTED] *See* CSX SOF ¶¶ 18-29.

²⁸ NPBL challenges the existence of “concerted action,” while NS argues there was no “agreement.” NS Br. at 33-35; NPBL Br. at 22-30. These arguments are functionally the same. *See Schlegel v. Bank of Am., N.A.*, 505 F. Supp. 2d 321, 325-26 (W.D. Va. 2007).

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- Ultimately, as described in a draft letter from NS intermodal to its appointed Board members, NS-appointed NPBL directors were to [REDACTED].” *See* CSX SOF ¶ 21. NS-appointed director Mark Manion appointed the NS members of the NPBL rate committee, who in turn worked to recommend rejection of CSX’s proposal. And NPBL, including through its NS-appointed directors did, voting to raise the rate to \$210—even though the previous rate was already “[REDACTED]”—and declining to approve CSX’s competing proposals for a lower rate to NIT. *See* CSX SOF ¶ 72.
- In 2010, after a lengthy period of NS-induced delay, NS-appointed NPBL directors rejected CSX’s service proposal by voting against a piece of it, despite NPBL management’s profitability assessment, in part based on a pretextual argument that the NPBL Operating Agreement requires a “uniform rate,” even though the NPBL Board had frequently “overridden” this purported restriction in the past, and CSX made clear that it had no objection to the rate being embodied in a tariff and offered to other intermodal customers. *See* CSX SOF ¶¶ 30-40.
- In 2015, Defendants imposed operational hurdles (framed as “proprietary issues”) to impede CSX’s ability to use NPBL to access NIT, even at the inflated rate. *See* CSX SOF ¶¶ 48, 49. NPBL’s Moss kept NS’s Luebbers apprised of CSX’s attempted movements, so Luebbers could assess the impact on NS’s customers. *See* CSX SOF ¶ 50.
- In 2015, NS canceled NPBL’s trackage rights so it could “[REDACTED]”, with the parties ultimately disagreeing about the rate. *See* CSX SOF ¶¶ 58-61. NPBL’s Moss identified this “dispute” as one basis preventing NPBL from considering CSX’s service proposal. *See* CSX SOF ¶ 66.
- In 2018, NPBL refused to establish an independent committee to assess CSX’s proposal, purportedly because it would “conflict” with the NPBL Operating Agreement, even though rate committees are “ad hoc” and “anybody” can participate, and refused to accept CSX’s proposal despite the fact that management concluded it would financially benefit NPBL. *See* CSX SOF ¶ 71.

In an attempt to discount all of this evidence, Defendants make two arguments: (1) that individual NS-appointed NPBL directors cannot be agents of NPBL, and (2) that there is no evidence of NPBL management’s involvement in the conspiracy. *See* NS Br. at 33-34; NPBL Br. at 24-27. As explained below, Defendants’ positions misstate the law and rely on contested facts. There is ample evidence of conspiracy here, including among NS employees, NS-appointed NPBL directors (who may act as agents of each of NS and NPBL), and NPBL management.

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1. NS's directors are agents of NPBL when acting in that capacity.

Defendants are simply wrong to suggest that individual NPBL directors employed by NS cannot be deemed agents of NPBL when acting in that capacity. “Directors are agents of a corporation who must act within the scope of their authority.” 18B Am. Jur. 2d Corporations § 1264; *see also Starring v. Kemp*, 188 S.E. 174, 177 (Va. 1936) (explaining that directors are agents of their corporation when conducting its business). Moreover, as the Supreme Court of Virginia has recognized, a person can act as an agent for one entity for one purpose while acting as an agent for another entity for a different purpose, depending on the facts of a particular case.²⁹ *See Cook v. John Hancock Life Ins. Co. (U.S.A.)*, No. 7:12-cv-00455, 2015 WL 178108, at *7 (W.D. Va. Jan. 14, 2015) (citing *Md. Cas. Co. v. Craig*, 194 S.E.2d 729 (Va. 1973) (analyzing an agent “acting in a dual capacity”)); *see also Haines v. Local 149, UAW*, No. 99-122, 2000 WL 1100034, at *1 (Va. Cir. Ct. July 27, 2000) (“[A] person may be an agent of two persons” or entities). The “creation, duration, and scope of an agency relationship” is a question of fact for the jury. *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 253 (4th Cir. 1974); *Acordia of Va.*, 560 S.E.2d at 250.

Neither case cited by Defendants suggests otherwise. Indeed, neither involves a conspiracy claim. In *Mosell Realty Corp. v. Schofield*, the Supreme Court of Virginia held that a would-be buyer could not enforce a real estate contract authorized by two directors but “repudiated” by the third. 33 S.E.2d 774, 778-79 (Va. 1945). The Court reasoned that, under the facts presented, the directors did not have “inherent or implied authority” to undertake “extraordinary and unusual

²⁹ For this reason, Defendants cannot rely on conduct by CSX-appointed NPBL directors to support its desired blanket “no agency” rule. *See* NS Br. at 34; NPBL Br. at 27. Whether an individual acts as an agent of an entity in any given situation depends on the specific facts at issue. *See Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P.*, 560 S.E.2d 246, 250 (Va. 2002).

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transactions such as the sale and purchase of real estate.” *Id.* at 777. Here, neither NS nor NPBL argue that NS-appointed Board members lack authority to vote on CSX’s various proposals; indeed, their argument is that only the Board could approve such things. Similarly, in *Monocan Hills, Inc. v. Page*, the Supreme Court of Virginia considered only whether, in a case seeking to compel transfer of stock, statements of individual directors were admissible as statements of the corporation. *See* 122 S.E.2d 654 (Va. 1961). Neither *Mosell Realty* nor *Monocan Hills* holds that actions by individual directors cannot be attributed to a corporation as a matter of law.

The Supreme Court’s decision in *Am. Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* is instructive. *See* 456 U.S. 556 (1982). In that case, an employee of a product manufacturer used his position on a subcommittee at a trade association, the American Society of Mechanical Engineers (ASME), to conspire *with his own company* against a competitor. *Id.* at 560-61. The Supreme Court affirmed a finding of conspiracy under the Sherman Act *against ASME*. *Id.* at 558-59. The Court held that facts were sufficient to confer conspiracy liability on ASME—particularly in the antitrust context—even though ASME’s only conspiratorial conduct came from a single subcommittee member conspiring with his employer. *Id.* at 572. Like ASME, NPBL can be held liable for the conspiratorial conduct of its individual directors, even when those directors engage in that conduct with their employer, NS.

The record contains more than enough evidence to allow the trier of fact to determine that NS-appointed NPBL directors acted as agents of NPBL when conducting NPBL business or directing the actions of NPBL itself. At a minimum, this is a fact issue that cannot be resolved on summary judgment. *See Famous Knitwear*, 493 F.2d at 253.

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2. The record contains ample evidence of conspiracy between NS and NPBL, above and beyond the conduct of NS's NPBL directors.

There is no question that CSX has adduced overwhelming evidence of the conspiratorial agreement between NS and NPBL, and overt acts in furtherance of that conspiracy, particularly when accounting for the conduct of NS-appointed NPBL directors that is attributable to NPBL. *See, e.g.*, CSX SOF ¶ 17 (evidence reflecting NS-appointed NPBL board member voting to disapprove rate that would benefit CSX at the behest of NS marketing personnel); *id.* ¶¶ 19-21, 24 (communications reflecting NS-appointed rate committee members' recommendations to NS-appointed NPBL directors to oppose favorable rate); *id.* ¶ 50 (communications between NPBL management and NS personnel regarding CSX's efforts to use NPBL to access NIT). This is more than enough to permit the trier of fact to reasonably conclude that Defendants entered into a conspiratorial agreement, and that at least one of them committed an overt act in furtherance of that agreement.³⁰ *See Robertson*, 679 F.3d at 289-90. Indeed, neither NS nor NPBL argues that there is insufficient evidence of a conspiracy if NS's NPBL Board members are agents of NPBL when they act in their Board capacity. *See* NS Br. at 33-35, NPBL Br. at 22-30.

Even without attributing the actions of NPBL Board members to NPBL, however, there remains ample evidence of conspiracy. Along with conduct by individual directors, CSX has identified evidence that the NS-controlled NPBL Board majority took actions—including official Board votes—in furtherance of Defendants' unlawful conspiracy. *See, e.g.*, CSX SOF ¶¶ 29, 40, 71. CSX also has identified evidence that Belt Line management (including NPBL President Cannon Moss) participated in the conspiracy. *See, e.g.*, CSX SOF ¶¶ 26, 50. NPBL's lengthy

³⁰ CSX must show only that *either* NS *or* NPBL committed an overt act in furtherance of the conspiracy. For this reason, NPBL's laser-like focus on CSX's answers to its Interrogatories Nos. 3 and 4 (*see* NPBL Br. at 23-27)—which asked CSX to identify only conspiratorial “communication(s)” and “overt act(s)” *by NPBL*—is misplaced.

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arguments about what inferences should be drawn from this evidence (NPBL Br. at 23-24, 27-30) simply underscore that summary judgment is inappropriate on CSX's claims. *Compare, e.g.*, NPBL Br. at 28 (interpreting evidence related to CSX's attempts to move traffic via NPBL in 2015) *with* CSX SOF ¶¶ 45-54.

At base, given NPBL's purpose to connect its owners (NS and CSX) to terminals along its line, a jury could easily infer that NPBL's refusal to engage with CSX's proposals—which NPBL itself had concluded would make it money—are reflective of a conspiracy with NS, particularly given the evidence of NS's involvement. *See* ECF No. 66 at 27 (“Although ultimately a merits question, courts have found that rejecting proposals which are in a company's own interest and within the company's power to accept may be evidence of, for instance, an antitrust conspiracy.”) (citing *SourceOne Dental, Inc. v. Patterson Companies, Inc.*, 310 F. Supp. 3d 346, 357 (E.D.N.Y. 2018) (in denying summary judgment, finding that “evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators” may reflect “a common motive to conspire”)); ECF No. 66 at 33 (“Therefore, Norfolk Southern's interest in maintaining a higher switch service rate, so that it can allegedly retain a virtual monopoly, diverges from Belt Line's interest in encouraging the business of Belt Line for which it was formed.”).

b. CSX's state-law conspiracy claims are supported by ample record contains evidence of “wrongful or tortious” conduct (Counts VIII-IX).

In arguing that CSX has not identified evidence of “unlawful” acts to support its conspiracy claims, Defendants misunderstand the standard for “wrongful or tortious” conduct underpinning these claims. CSX alleged wrongful or tortious conduct to support its Virginia conspiracy claims, and it now has sufficient evidence to support those allegations.

First, Defendants argue that only conduct pled as a separate count can support a Virginia statutory business conspiracy claim. *See* NS Br. at 37, NPBL Br. at 30-31. The Court can quickly

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dispense with this argument. The conduct underlying CSX's conspiracy claims need not be a "tort" taught in the first year of law school. Virginia law requires only that CSX show that it suffered damages from "an act that is itself *wrongful or tortious*." *Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 317 (Va. 2014) (emphasis added).

Moreover, contrary to Defendants' suggestion, CSX need not show that all conspirators engaged in the underlying misconduct. "The object of a civil conspiracy claim is to spread liability to persons other than the primary tortfeasor." *Gelber v. Glock*, 800 S.E.2d 800, 821 (Va. 2017). So "[t]here is no requirement that the party sued for civil conspiracy be the actual tortfeasor." *L-3 Commc'ns Corp. v. Serco, Inc.*, 926 F.3d 85, 92 (4th Cir. 2019) (applying Virginia law).

The record contains evidence of many "wrongful or tortious" acts, including NS's wrongful monopolization under the Sherman Act and the Belt Line's individual directors' violations of fiduciary duties.³¹ The state law conspiracy claims must remain.

III. CSX Has Properly Supported its Antitrust Claims (Counts I-IV).

a. NS is not absolved of Section 2 liability merely because NPBL was involved.

NS contends that CSX cannot assert monopolization and attempted monopolization claims under Section 2 of the Sherman Act, because that section addresses only "unilateral conduct by a single firm." NS Br. at 28. This argument fundamentally misunderstands CSX's monopoly claims and the relevant law.

A claim of monopolization under Section 2 of the Sherman Act requires, "in addition to the possession of monopoly power in the relevant market," proof that the defendant willfully

³¹ Again, because the defendant in a conspiracy claim need not be the underlying tortfeasor, *L-3 Commc'ns*, 926 F.3d at 92, it does not matter that the individual defendants were voluntarily dismissed from the case. Those co-conspirators were not dismissed for failure to state a claim, and the Court has never ruled that they did *not* breach their fiduciary duties, as CSX alleged and as the record supports. *See* ECF Nos. 143 (dismissal order).

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acquired or maintained its monopoly through anticompetitive means, “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Although “[a]nticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties,” *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998), Section 2 claims “usually involv[e] some assay by the monopolist into the marketplace—to limit the abilities of third parties to deal with rivals (exclusive dealing), to require third parties to purchase a bundle of goods rather than just the ones they really want (tying), or to defraud regulators or consumers.” *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); *see, e.g., Conwood Co., LP v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (upholding \$1.5 billion total jury award on § 2 claims based in part on evidence that monopolist’s sales representatives persuaded third party retailers to remove or destroy rival’s product displays and exclude rival’s products from sales); *U.S. v. Microsoft*, 253 F.3d 34, 71 (DC Cir 2001) (approving monopolization claim premised on licensing arrangements prohibiting customers from engaging with competitors).

NS cites no case suggesting otherwise. Neither *Oksanen v. Page Memorial Hospital* nor *Midwest Gas Services, Inc. v. Indiana Gas Company* considered whether a defendant could involve third parties in its monopolistic efforts, as both turned on other elements of a Section 2 claim. *See Oksanen*, 945 F.2d 696, 710 (4th Cir. 1991) (monopolistic intent); *Midwest Gas*, 317 F.3d 703, 713 (7th Cir. 2003) (antitrust injury). And in *Sun Dun, Inc. of Washington v. Coca-Cola Co.*, the court considered whether two competitors could engage in a “shared monopoly” for their *joint* benefit. *See* 740 F. Supp. 381, 391 (D. Md. 1990). That is not the situation here, where the

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monopolist is NS, and the conduct at issue is not intended to benefit NPBL—in fact, NPBL has been *harmed* by NS’s monopolistic actions.³²

b. The record shows that NS has maintained an illegal monopoly at NIT, not that NIT is an “essential facility” to which NS has denied access.

NS argues at length that CSX cannot prove its monopoly claims under an “essential facilities” theory. *See* NS Br. at 28-33. But CSX has not pled—and need not rely on—a theory that NS has denied CSX access to an “essential facility” under its control. The parties agree that NIT, like other POV terminals, is owned by VPA and operated by VIT, both of which have endorsed CSX’s efforts to obtain on-dock access at NIT. *See* CSX SOF ¶¶ 81, 86, 100. And CSX’s efforts, as alleged in the Complaint and reflected in the record, have been in an attempt to access NIT *via* NPBL, not NS.

CSX has asserted straightforward monopoly claims based on NS’s illegal maintenance of its monopoly at NIT, including through its conspiracy with NPBL to block CSX’s access to on-dock rail at NIT. *See* ECF No. 1 ¶¶ 85-104. NS cannot avoid the consequences of its anticompetitive actions by attempting to recast CSX’s claims under the “essential facilities” doctrine.³³

c. NS and NPBL conspired to restrain trade in violation of Section 1.

Defendants’ arguments about CSX’s § 1 claim is also unpersuasive. To establish a

³² This is yet another argument in which NS seeks to have it both ways. It claims, on the one hand, that it cannot be responsible for actions by a third party (NPBL), while at the same time arguing that its appointed majority of that third party’s board “exercise control” over that third party. *See* ECF No. 116 at 9-10.

³³ NS suggests briefly that, even outside the “essential facilities” doctrine, CSX has not shown that it was “substantially foreclosed” by Defendants’ conduct, because CSX has paid NPBL’s switch rate in other contexts and CSX’s market share increased over the relevant period. *See* NS Br. at 32-33. These are issues of disputed fact that cannot be resolved on summary judgment. *See* CSX SOF ¶¶ 75, 99.

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violation of § 1 of the Sherman Act, CSX must prove “(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade.” *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 371 (4th Cir. 2013). The record contains substantial evidence of Defendants’ conspiracy. *See supra* at 52-58. That concerted action has unreasonably restrained competition under either of the prevailing standards for evaluating challenged restraints: the per se standard or the “rule of reason.” *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007).

1. Defendants’ conduct is a per se violation of the Sherman Act.

NS contends that Defendants’ conduct cannot be a per se violation of the Sherman Act because NS and NPBL are in a vertical relationship. *See* NS Br. at 35-36. Not so. It is undisputed that the only railroads capable of offering on-dock access at NIT are either NPBL or NS. In the context of that service, therefore, NS and NPBL are at a minimum *potential* horizontal competitors. Accordingly, their conspiracy to block CSX’s access to on-dock rail at NIT is a horizontal agreement that is per se illegal. *See Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F.Supp.3d 703, 712 (E.D. Va. 2019) (agreements between competitors or potential competitors to restrain trade are horizontal). That does not change simply because NPBL may have a vertical relationship to NS at other locations. Where, as here, the predominate nature of the restraint at issue is horizontal, the per se rule applies. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28 (1977) (certain restrictions originating from agreements between entities can be vertical in some contexts and horizontal in others).

2. Defendants’ conduct is also a violation of the Sherman Act under the Rule of Reason.

Under the rule of reason, a factfinder must analyze “all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint

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on competition.” *Continental T. V.*, 433 U.S. at 49. The focus of this analysis is the impact on competitive conditions in the relevant market, *see Nat’l Soc’y of Pro. Engineers v. United States*, 435 U.S. 679, 688-92 (1978), including “consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effect, and the history of the restraint and the reasons for its adoption,” *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972), and whether the defendants have market power in the relevant market, *Leegin Creative Leather Prods.*, 551 U.S. at 885-86; *see also E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 688 F. Supp. 2d 443, 456 (E.D. Va. 2009).

(i) CSX has defined a relevant market, and NS’s criticisms of that market turn on disputed facts.

“[T]he definition of a relevant antitrust market is a highly fact-intensive inquiry,” *Cont’l Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 568 (E.D. Va. 2000), and NS’s arguments about the relevant market turn on issues of disputed fact. “The market definition has two components—the relevant product market and the relevant geographic market.” *E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 637 F.3d 435, 441 (4th Cir. 2011). Each piece of this analysis is “a fact-intensive exercise centered on the commercial realities of the market and competition.” *Id.* at 442, 443 n.3. Examining these “commercial realities” must include analyzing:

where the parties market their products; the size, cumbersomeness, and perishability of the products; regulatory requirements impeding the free flow of competing goods into or out of the area; shipping costs and limitations; the area within which the defendant and its competitors view themselves as competing; and other factors bearing upon where customers might realistically look to buy the product.

Id. at 442-43. The broad range of the results of these analyses shows the importance of each case’s particular facts. In part because of the “deeply fact-intensive inquiry” inherent in defining a market, *id.* at 443, “[t]he Supreme Court has counseled that summary judgment in antitrust

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litigation should be used sparingly.” *Ratino v. Med. Serv. of Dist. of Columbia (Blue Shield)*, 718 F.2d 1260, 1268 n.23 (4th Cir. 1983) (citation omitted).

NS seeks to paint a picture of a world in which ocean carriers can decide to send their ships to *any* port at *any* time and discharge their cargo to *any* form of transportation. Indeed, NS asserts that competition among ports along the East Coast invalidates CSX’s market definition. *See* NS Br. at 25. This distortion of reality has the benefit of avoiding any consequences from Defendants’ anticompetitive conduct to block CSX from on-dock access at NIT. But in the real world, ocean carriers demand service at the Port of Virginia—including NIT specifically—and CSX must have on-dock rail access at NIT to be competitive for their business. *See* CSX SOF ¶¶ 81-86. Ocean carriers do not, as NS suggests, make a decision about railroad alignment and then on that basis decide to discharge cargo at the Port of Baltimore, or even the Port of NY/NJ, instead of at Port of Virginia. *See* CSX SOF ¶¶ 79-80. To the contrary, carriers make sophisticated decisions about port routing on the basis of many factors other than railroad alignment, including port costs, vessel productivity, and carrier alliances. *See* CSX SOF ¶¶ 78-79. The same is true within the Port of Virginia. Terminal selection at POV is driven by a variety of considerations, the *least* of which is railroad alignment. *See* CSX SOF ¶ 92. Indeed, the empirical data confirm that container traffic *does not shift* between NIT and VIG based on changes in railroad alignment. *See* CSX SOF ¶ 93. Accordingly, CSX must take ocean carriers’ choices of ports and terminals as given—and it must offer on-dock service at major terminals like NIT to compete for their business.

The parties disagree on the factual underpinnings of the relevant market definition. For example, NS contends that CSX’s proffered geographic market disregards competition among various *ports* for discretionary cargo. *See* NS Br. at 24-26. But the record contains ample evidence that although *ports* may compete for this traffic, railroads have little ability to influence ocean

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carriers' choices about at which ports to call. *See* CSX SOF ¶¶ 79-80. NS also argues that NIT is interchangeable with other POV terminals, because VIT decides at which terminal carriers call. *See* NS Br. at 24. PMT and VIG are not reasonable substitutes for NIT, however, because the record shows that many factors other than rail alignment influence terminal selection. *See* CSX SOF ¶¶ 89-91. Indeed, VIT candidly admits that it cannot steer all CSX-aligned traffic away from NIT—a fact that the empirical data confirm. *See* CSX SOF ¶¶ 92-93. Finally, NS contends that CSX's defined service market overlooks "end-to-end truck transportation" as a competitive alternative to rail. *See* NS Br. at 26. This argument ignores the great weight of the evidence, which reflects that trucks and rail do *not* compete for international intermodal freight traveling beyond local markets. *See* CSX SOF ¶¶ 95-98. As NS's expert acknowledges, the major Midwest markets served from NIT are all further than 500 miles, meaning trucks are not a reasonable competitive alternative. *See* CSX SOF ¶¶ 96-97; *see also* NS Ex. 71 ¶¶ 38-44. All of these factual disputes preclude summary judgment.

(ii) NS's monopoly power is also shown through ample evidence of actual harm to competition.

Separate and apart from defining the relevant market, CSX can also prevail by demonstrating monopoly power directly. Defining the relevant market, and showing a defendant's power within that market, allows an antitrust plaintiff to establish anticompetitive effect indirectly. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998). When the plaintiff can prove monopoly power "directly by showing *actual anticompetitive effects*, such as control over output or price," however, there is no need to precisely define the relevant market. *Id.*; *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such

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as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’’). CSX need not specifically define the relevant market in this case, because the record shows that Defendants’ actions have resulted in actual anticompetitive harm to ocean carriers, regardless of the precise metes and bounds of the market. *See* CSX SOF ¶ 101; *see also* NS Ex. 7 ¶¶ 69-73, 78-81; NS Ex. 71 ¶¶ 78-81.

(iii) CSX’s expert’s market definition matches the Complaint, and NS has shown no prejudice from any purported differences.

Finally, NS contends that the Court should grant summary judgment based on purported discrepancies between the market definition alleged in CSX’s complaint and that set forth in its expert’s report. *See* NS Br. at 21-22.

As stated in CSX’s Complaint, the relevant geographic and service market at issue is rail freight transportation into and out of Hampton Roads’ intermodal port facilities. ECF No. 1 ¶¶ 49-50. As discussed at length in the Complaint, this case is about Defendants’ efforts to deny CSXT on-dock rail access at NIT and the resultant harm to CSX and the market. *Id.* ¶ 3 (Defendants have acted in concert to “maintain NS’s monopolistic control over intermodal transportation in and out of NIT by making it practically impossible for any other rail carriers to provide intermodal rail service to NIT.”); ¶ 54 (NS and NPBL have taken anticompetitive acts to “effectively deny[] CSXT access to NIT by rail in competition with NS”); ¶ 57 (Defendants conspired to set and maintain NPBL switch rates—which CSX must pay to access NIT—“at levels designed to exclude competition in the relevant market”); ¶ 79 (Defendants conspired to take actions to effectively foreclose CSX from using NPBL “to compete in the provision of multi-modal services at NIT,” in violation of § 1 of the Sherman Act).

To the extent there was any question about the relevant market, CSX’s expert put a finer point on it in his February 25, 2020 expert report: “[T]he provision of on-dock access to NIT is a

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relevant market.” NSR Ex. 7 at ¶ 12 (emphasis in original); *see also id.* ¶¶ 37-51 (describing the relevant market). NS’s expert understood CSX’s market definition and responded to it in his report, filed February 3, 2021. *See* NS Ex. 10 ¶ 49 (“This case involves the alleged foreclosure by NSR of CSXT’s rail access to one terminal, NIT, at the Port of Virginia.”) (citing ECF No. 1 ¶ 42). Given that CSX’s market definition has been clear since the Complaint was filed in October 2018, NS’s new protests that it has not been provided fair notice ring hollow.

Even if there were a difference between the market definition pled by CSX and that articulated by Dr. Marvel (which there is not), Defendants cannot show they have been prejudiced as a result. Dr. Marvel’s description of the market is comfortably within the market defined by the Complaint, which not only referenced market share at NIT, but also contained numerous allegations related to NIT specifically—as this Court noted in assessing CSX’s allegations of antitrust injury at the motion to dismiss stage. *See* ECF No. 66 at 35; *see also Four Corners Nephrology Assoc., P.C. v. Mercy Med. Ctr. of Durango*, No. 05-2084, 2008 WL 2355533, at *4 n.3 (D. Colo. May 22, 2008) (permitting plaintiffs to rely on a narrower market definition than plead in their complaint, given lack of prejudice to defendants).

Moreover, due to the long stay in this case, Defendants conducted substantially all of their fact discovery with the benefit of Dr. Marvel’s report, including his detailed description and analysis of the relevant market. *See* ECF No. 254. NS’s expert likewise had a full year to formulate his response to Dr. Marvel’s report, and he *directly addressed* this issue. This is simply not a case in which a purported change to market definition surprised Defendants or prejudiced their defense in any way. *See City of New York v. Group Health, Inc.*, 649 F.3d 151, 157-58 (2d Cir. 2011) (affirming refusal to permit plaintiff to amend its complaint to alter its market definition, noting that defendant would be prejudiced because of the need to conduct new discovery on a

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“different and much broader market”). Summary judgment is thus inappropriate. *See Precision Seed Co. v. Consol. Grain & Barge Co.*, No. 3:03cv079, 2006 WL 840377, at *11 (S.D. Ohio March 30, 2006) (refusing to grant summary judgment where market definition asserted by plaintiff’s expert was different than that pled in the complaint, finding defendant would suffer no prejudice if “new” definition were offered at trial).

Further, the record contains ample evidence that NS dominates the market, whether evaluating its share at just NIT or at all Port of Virginia terminals. *See CSX SOF* ¶ 13 (NS has handled between █% and █% of international intermodal business at the Port of Virginia—and between █% and █% at NIT—between 2009 and 2020); *see also E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 688 F. Supp. 2d 443, 456 (E.D. Va. 2009) (noting monopoly power has been found where “the defendant controlled seventy to one hundred percent of the relevant market”). Indeed, in response to criticisms from NS’s expert, Dr. Marvel assessed harm to ocean carriers and calculated damages to CSX based on an alternative market definition comprising the Port of Virginia as a whole. *See CSX SOF* ¶¶ 101-102; NS Ex. 71 ¶¶ 122-23.

If this Court concludes, however, that there is a meaningful divergence between the market definition in CSX’s Complaint and Dr. Marvel’s report, CSX can readily and quickly amend its Complaint, with leave of Court, to modify its market definition—a course of action approved in antitrust matters even at the late stage of trial. *See, e.g., Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1342-43 (11th Cir. 1987) (permitting plaintiffs to amend complaint to allege different market because defendant failed to show prejudice).

3. Defendants’ argument that the NPBL rate is “justified” rests on disputed facts.

NPBL argues that CSX has not shown that Defendants’ conduct “unreasonably restrained trade,” because, in its view, NPBL’s switch rate is “justified” by its costs. *See NPBL Br.* at 31-

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36; *see also* NS Br. at 35. This argument fails. Contrary to NPBL's suggestion, CSX's claims do not "hinge" on the NPBL's switch rate.³⁴ As the record shows, Defendants have engaged in wide variety of anticompetitive conduct, including, but not limited to, setting and maintaining a switch rate excessive for intermodal traffic. When deciding whether Defendants' conspiracy unreasonably restrained trade in violation of the Sherman Act, the trier of fact must consider the *totality* of this conduct. *See 3M*, 324 F.3d at 162.

The record also contains substantial evidence refuting NPBL's suggestion that the \$210 rate is needed to cover its costs for service to NIT. *See* NS Ex. 71 ¶¶ 57-58 (noting that, because average costs would decline with additional traffic, charging a price per car sufficient to cover current average costs is unreasonable). In analyzing the Belt Line's costs, NPBL's expert makes no attempt to distinguish between fixed costs, which would not increase with additional traffic, and variable costs, which would. *See* NPBL Br. at 34 (citing NPBL Ex. 3 at Tbl. 5). As NPBL's Cannon Moss testified, because fixed costs would not change, NPBL's total cost per car would decrease as the number of cars handled increased. *See* CSX SOF ¶¶ XX. And both CSX and NPBL repeatedly determined that NPBL could cover its costs and gain incremental income by moving intermodal containers at a lower switch rate. *See* CSX SOF ¶¶ XX. These disputes of fact preclude summary judgment.

NPBL's reliance on *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309, 1323 (D. Md. 1989), is misplaced. *See* NPBL Br. at 34-37. In *Laurel Sand*, the court considered whether, in the context of an essential facilities claim, CSX had to offer the plaintiff trackage rights in lieu of the switch rate offered. *See* 704 F. Supp. at 1323. It determined that the rate offered by CSX (\$0.01 per ton above its *variable* costs) was not so unreasonable as to amount to a denial of

³⁴ Indeed, NS does not attempt to argue that this is the only conduct at issue. *See* NS Br. at 35-36.

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access under an “essential facilities” theory. *See id.* As explained above, this is not an essential facilities case. *See supra* at 60-61. Nothing in *Laurel Sand* suggests that the Court can conclude that NPBL’s rate is justified by its costs as a matter of law—much less that Defendants’ conduct as a whole did not unreasonably restrain trade or improperly maintain NS’s unlawful monopoly.

IV. CSX’s Breach of Contract Claim (Count V) is Well-Supported

NS breached its obligations under the NPBL Operating Agreement. Under Virginia law, “[t]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant’s violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.” *Filak v. George*, 594 S.E.2d 610, 614 (Va. 2004). NS does not dispute that the Operating Agreement creates legally binding obligations between it and CSX; it contends that none of its actions breached a provision of the Operating Agreement. NS Br. at 37-40.

NS has breached several provisions of the Operating Agreement. For example, the Tenth Article states that the parties to the agreement—that is, NS and CSX—“will co-operate cordially in encouraging the business of the [NPBL] for which it is constructed.” ECF No. 1-1 at 6. As this Court has noted, “cooperation clauses are generally enforceable.” ECF No. 66 at 42 (citing *Feldman Prod., Inc. v. Indus. Risk Insurers*, No. Civ.A. 3:09-0481, 2011 WL 4543966, at *4 (S.D.W. Va. Sept. 29, 2011)). NS argues that NPBL, not CSX, would be the proper party to claim damages caused by a breach of this obligation—contrary to the express language of the Operating Agreement that NPBL operates “for the mutual benefit of each [shareholder] in the interchange of business.” NS Br. at 39; ECF No. 1-1 at 3. Indeed, the record evidence establishes that NS has failed to co-operate with CSX to encourage the business of NPBL, blocked CSX from using NPBL,

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failed to act on proposals that would encourage the business of NPBL, insisted on actions that would harm NPBL, and induced its directors to do the same.

NS has also breached the implied covenant of good faith and fair dealing, included in every contract governed by Virginia law. *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443, 450 (E.D. Va. 2009). In addition to certain of NS's actions expressly violating the Operating Agreement, NS is also liable for breach of the Agreement if it exercised its "contractual discretion in bad faith." *Morrison v. Wells Fargo Bank, N.A.*, 30 F. Supp. 3d 449, 456 (E.D. Va. 2014). Courts have also held that the covenant is breached when a party has "act[ed] in such a manner as to prevent the other party from performing his obligations under the contract." *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 183 (4th Cir. 2000). At the least, NS has prevented CSX from "deliver[ing] to the [NPBL] all cars to be interchanged with other Companies." ECF No. 1-1 at 6. Ample evidence exists that NS breached the NPBL Operating Agreement.

CONCLUSION

For all these reasons, the Court should deny Defendants' Motions.

Dated: May 3, 2021

Respectfully submitted,

CSX TRANSPORTATION, INC.

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of May, 2021, a true and correct copy of the foregoing was served on all counsel of record via Notice of Electronic Filing by filing with the Court's CM/ECF system.

/s/ Benjamin L. Hatch

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Exhibits 1-33

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Exhibit 34

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NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

1050 Virginia Av.
P. O. Box 7547
Portsmouth, VA 23707
(757)393-2622

August 5, 2010

Mr. Allison
Mr. Armbrust
Mr. Drake
Mr. Eliasson
Mr. Wheeler

Re: Rail Service Connection to NIT – CSXT Rate Proposal dated July 23, 2010

Gentlemen:

Management has reviewed the rate proposal from CSXT for carriage of single-stack intermodal traffic between Berkley Yard and Norfolk International Terminal (NIT) outlined in your letter of July 23, 2010. A copy is enclosed for reference.

The basic assumption underlying the proposal is that NPBL can, with a single train crew during one eight hour (third) shift utilizing CSXT supplied power, take an inbound CSXT intermodal train from NPBL's Berkley Yard to NIT, drop it off, and return with an outbound CSXT intermodal train from NIT to the Berkley Yard. Management is interested in exploring whether it can undertake the requested service at a mutually agreeable rate. However, there are several issues and risks that need to be addressed in evaluating the proposal.

First, Article Ninth of the Operating Agreement of July 7, 1897 between NPBL's owners requires that freight rates be uniform. As proposed by CSXT, the handling of interchange traffic on the basis of a per-container rate would violate the terms of the Operating Agreement. Either the shareholders would need to amend the Agreement or approve an exception to its terms.

Second, the company's bylaws require that any agreement allowing foreign locomotives to operate over NPBL tracks must be reported immediately to the board of directors, and is subject to approval or disapproval of the board at any subsequent meeting. If the board does not approve the use of CSXT locomotives as proposed, NPBL will be required to lease additional power from Norfolk Southern (NS) to perform the requested service, resulting in additional expenses for locomotives and other services.

Third, assuming the first two issues can be resolved, NPBL would need to hire additional T&E personnel to perform the requested service. Costs of doing so indicate that incremental operating income would be approximately \$85,000 annually, not \$146,000 as estimated by CSXT.

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NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

1050 Virginia Av.
P. O. Box 7547
Portsmouth, VA 23707
(757)393-2622

Fourth, there are several operational issues, all of which pose the financial risk to NPBL of having to devote more than one eight-hour crew to perform the requested service. These include:

- CSXT missing either the pick-up or drop-off interchange time windows;
- Equipment not being ready at NIT for the return move;
- Operational delays en route due to shared trackage with NS which runs several trains to NIT over the same tracks during the same midnight-to- 5:00am service window; and
- The suggested use of an alternate location for a CSXT pick-up point for the outbound train.

Financial consideration for these items will need to be addressed if we reach the point of a final contract.

Fifth, NPBL would need to make sure that the additional business did not interfere with its ability to serve existing customers adjacent to NIT. Management believes that this can be reasonably accommodated, though it will take time to ensure that traffic for those customers is not adversely affected.

Finally, the requested three-year term needs to allow for interim review and adjustment, including possible rate increases, to keep incremental income per container consistent.

In the past, issues regarding rate changes have been referred by the board to the Rate Committee for review. However, in light of the need for shareholder and board approval with respect to the first two issues, management will convene a meeting of the board of directors and, if necessary, the shareholders, to consider the CSXT rate proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'David H. Stinson'.

David H. Stinson
President

Enclosure: CSXT Rate Proposal – July 23, 2010

Cc: Ms. Donna N. Coleman, Vice President
James L. Chapman, IV, General Counsel

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Exhibits 35-53

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Exhibit 54

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**REPORT OF THE OFFICE OF INTERMODAL
PLANNING AND INVESTMENT**

**Master Rail Plan for The
Port of Virginia (SJR 69, 2014)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



SENATE DOCUMENT NO. 12

**COMMONWEALTH OF VIRGINIA
RICHMOND
2015**

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MEMORANDUM

To: Joint Legislative Audit and Review Committee

From: The Office of Intermodal Planning and Investment
The Virginia Department of Rail and Public Transportation
The Port of Virginia

Date: May 14, 2015

Subject: Senate Joint Resolution 69: Master Rail Plan for the Port of Virginia

This correspondence is to provide notification that the Office of Intermodal Planning and Investment (OIP), in consultation with the Department of Rail and Public Transportation (DRPT) and the Virginia Port Authority (VPA), has completed the enclosed Master Rail Plan for the Port of Virginia.

In March 2014, the Virginia General Assembly passed Senate Joint Resolution 69 (SJR 69), directing OIP to develop a Master Rail Plan for the principal facilities of the Port of Virginia with the objective of improving the Port's overall competitive position through improved rail, for the benefit of the Commonwealth and its citizens.

SJR 69 specifically directs that the Master Rail Plan address six specific issues, which it has done so as follows:

1) The status and characteristics of the current rail systems that support the port facilities.

The Master Rail Plan provides an inventory and maps of the Port of Virginia's principal facilities, their associated on-dock rail systems, and the railroad-owned networks that support them:

- Virginia International Gateway (VIG)
- Norfolk International Terminals (NIT)
- Portsmouth Marine Terminal (PMT)
- Newport News Marine Terminal (NNMT)
- Port of Richmond (POR)
- Virginia Inland Port (VIP)
- Future Craney Island Marine Terminal (CINT)

The inventory includes descriptions of the rail facilities, typical rail operations they support, and which railroads have trackage rights at each location and on the railroad-owned networks supporting them.

2) The development of a master rail plan with the flexibility to support both near- and long-term business opportunities at the port facilities.

The Master Rail Plan identifies key features such as infrastructure or services likely to attract various types of port-served industries. It further identifies typical challenges associated with

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establishing rail-served industries on the port's terminals and provides recommendations for improving coordination between economic development stakeholders.

- 3) The identification of any operational and physical constraints or limitations on providing efficient and competitive dual rail access service to the port facilities and recommendations to mitigate them to the extent practicable.**

The Master Rail Plan documents existing rail access for each of the Port of Virginia's principal facilities. It further describes the various means in which dual rail access exists (or could be established) and the limitations that exist with regard to the access being competitive.

Recommendations to mitigate these limitations are provided, primarily via continued investment in facilities that already have competitive dual rail access, programs to foster improved operational efficiency, and through possible infrastructure improvements (that would require buy-in from the owning railroad).

- 4) The identification of any improvements to rail access to the port facilities and related intermodal facilities to support desired train volumes.**

The Master Rail Plan identifies and recommends several improvements to the rail networks supporting the terminals to support increased rail volume. These improvements would require approval of the owning railroad. The Master Rail Plan also acknowledges that increased rail traffic will have an impact on the surrounding communities and recommends a program be established to assist with mitigation of rail impacts.

- 5) The identification of potential increases to the port facilities' intermodal rail throughput capacity as demand increases.**

The Port's capacity to transfer containers between ship lines and railroads to meet increasing demand is an interaction of several elements, many of which have a confidential and/or competitive element with limited transparency. The Master Rail Plan identifies where opportunity is present to increase rail capacity, but further acknowledges that increases to port facility rail capacity requires the careful coordination of multiple stakeholders, including the Port, railroads, and U.S. Customs & Border Protection. Recommendations for improving this coordination are provided as a critical first step.

- 6) Strategic recommendations to guide future rail planning and funding decisions to support desired train volumes.**

The Master Rail Plan follows a period of significant capital investment in rail and rail-related facilities, and therefore recommends the focus be on earning an appropriate level or rate of return on those investments through better collaboration among major stakeholders, out of which additional infrastructure improvements may be identified.

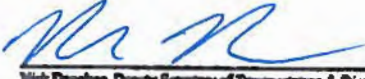
The Master Rail Plan also identifies potential capital improvements to consider in light of the more immediate operational, administrative, and strategic decision-making recommendations.

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The Office of Intermodal Planning and Investment has identified numerous opportunities to improve collaboration between public and private stakeholders for the benefit of the Commonwealth and its citizens, and looks forward to supporting future efforts to move forward with the recommendations identified within the Master Rail Plan for the Port of Virginia.

The Virginia Office of Intermodal Planning and Investment's Director and Deputy Secretary of Transportation, recognizes and endorses this final plan as certified by his signature below:



Nick Donohoe, Deputy Secretary of Transportation & Director, OIP

6/8/15
date

The Executive Director of the Port of Virginia recognizes and endorses this plan's completion, as certified by his signature below:



John P. Robinson, Executive Director, POV

5/14/15
date

The Director of the Virginia Department of Rail and Public Transportation recognizes and endorses this plan's completion, as certified by her signature below:



Jennifer Mitchell, Director, CRPT

4/30/15
date

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MASTER RAIL PLAN FOR THE PORT OF VIRGINIA

PRESENTED TO



April 16, 2015

PREPARED BY



moffatt & nichol

R.L. Banks & Associates, Inc. 
ECONOMICS · ENGINEERING · SERVICE PLANNING

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Master Rail Plan for The Port of Virginia

Office of Intermodal Planning and Investment

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Acronyms

AAPA	American Association of Port Authorities
BCR	Bay Coast Railroad
CA	Chesapeake & Albemarle Railroad
CBP	U.S. Customs and Border Protection
CIDMMA	Craney Island Dredged Material Management Area
CIEE	Craney Island Eastward Expansion
CSX	CSX Transportation
CRY	Norfolk International Terminals' Central Rail Yard
CWRY	Commonwealth Railway
DRPT	Virginia Department of Rail and Public Transportation
NIT	Norfolk International Terminals
NNMT	Newport News Marine Terminal
NPBL	Norfolk and Portsmouth Belt Line Railroad
NS	Norfolk Southern Railway
OIPI	Virginia Office of Intermodal Planning and Investment
PMT	Portsmouth Marine Terminal
POR	Port of Richmond (Richmond Deep Water Terminal)
POV	The Port of Virginia
REF	Rail Enhancement Fund
Ro-Ro	Roll on – Roll off
TEU	Twenty-foot Equivalent Unit
VIG	Virginia International Gateway (former APM Terminal)
VIP	Virginia Inland Port
VIT	Virginia International Terminals, LLC
VPA	Virginia Port Authority
VS RP	Virginia State Rail Plan

Glossary

Break bulk: Goods that must be loaded individually, and not in intermodal containers or bulk.

Bulk: Commodity cargo that is transported unpackaged in large quantities, usually material in either liquid or granular form, such as petroleum/crude oil, grain, coal, or gravel.

Class I railroad: A railroad with annual carrier operating revenues of \$250 million or more. In the U.S., Amtrak and seven freight railroads are designated Class I based on 2011 measurements released in 2013.

Class III railroad: Class III railroads are typically local short-line railroads serving a small number of towns and industries or hauling cars for one or more larger railroads. Many Class III railroads were once branch lines of larger railroads or abandoned portions of main lines.

Competitive dual rail access: Rail access where a customer has the opportunity to select between two railroads to transport cargo, on the basis of price, speed of delivery, and/or service quality/reliability, such that the railroads will compete for the service.

Crossover: A pair of switches that connects two parallel rail tracks, allowing a train on one track to cross over to the other.

Deramp: To remove goods or containers from a railroad car using special equipment.

Discretionary rail cargo: Rail cargo that has competitive rail access at multiple ports.

Double track: A railway with one track running each direction.

Double-stack: A form of intermodal freight transport where intermodal containers are stacked two high on railroad cars.

Dual Rail Access: Rail access where a customer may choose from two railroads to move cargo through.

Intermodal container: A standardized reusable steel box used to store and move materials and products in the global containerized intermodal freight transport system that can be moved from one mode of transport to another (from ship, to rail, to truck) without unloading and reloading its contents.

Ramp: A sloping platform situated at the end or beside a track and rising to the level of the floor of the rail cars.

Single stack: A form of intermodal freight transport where intermodal containers are stacked one high on railroad cars.

Trackage/Operating rights: an arrangement between railroads where the owner of the track retains all rights, but allows another company to operate over certain sections of its track. These deals can be long- or short-term; can include the right to serve customers on the line or not; and can be exclusive or not.

Twenty-foot equivalent unit (TEU): An inexact unit of cargo capacity based on the volume of a 20-foot-long intermodal container.

1. EXECUTIVE SUMMARY

The General Assembly initiated through Senate Joint Resolution 69 (SJR 69) the development of a Master Rail Plan for The Port of Virginia. The objective of this Master Rail Plan is to improve the overall competitive position of the Port through improved rail service to Port of Virginia facilities (specifically those owned or leased by the Virginia Port Authority), for the benefit of the Commonwealth and its citizens. The Master Rail Plan does not specifically consider private marine terminals or the bulk rail service (e.g., coal, grain or aggregates) to those terminals.

Rail service, in the context of this plan, is the collective term for the opportunity to transport cargo by rail as part of an overall competitive cost, schedule and service quality structure (against other port locations) and via a system that has sufficient capacity to reliably and safely handle the demand volume.

A summary of specific issues the General Assembly requested be addressed in the Master Rail Plan can be found in **Appendix A**.

1.1. Background

While the Master Rail Plan considers the movement of containerized, bulk, and break bulk cargo through The Port of Virginia, some of the most significant master plan issues relate to the import and export of containers through The Port of Virginia – a highly competitive global industry, as illustrated by Table 1:

Table 1 – U.S. East Coast Port 2013 throughput

SEAPORT	NEW YORK	BALTIMORE	VIRGINIA	CHARLESTON	SAVANNAH	MIAMI
2013 TEU	5,467,345	705,230	2,223,532	1,601,366	3,034,010	901,454
2013 % Rail Cargo	~14%	10% goal	~34%	10% goal	~22%	10% goal

Source: AAPA and individual ports

For over 180 years, the maritime industries of Virginia have been served by multiple rail lines, which have evolved into today's current rail network served by two Class I railroads (Norfolk Southern and CSX Transportation) that connect The Port of Virginia to inland markets, as well as short line railroads that provide local rail service between the Class I railroads and industries. Ownership of the rail network elements and trackage rights agreements between the railroads shape the opportunities available to Virginia industries, including the individual Port of Virginia facilities, to use rail service to their competitive advantage.

Having evolved over more than a century, the rail network serving The Port of Virginia is not a simple grid, and just as The Port of Virginia competes for global cargo, the railroads compete for cargo at The Port of Virginia and the right to move that cargo on their private rail infrastructure. This competition for cargo is

further part of the larger competitive environment where both ship lines and the railroads make strategic decisions regarding vessel schedules and pricing across their entire systems, which include multiple port locations. These decisions ultimately affect the Port's competitiveness but are outside the Port's ability to fully control. Attracting rail cargo to The Port of Virginia is achieved by minimizing the cost and maximizing the reliability of the transfer between the ship lines and the railroads. Figure 1 below begins to illustrate the complexity of the rail network serving The Port of Virginia Hampton Roads facilities.

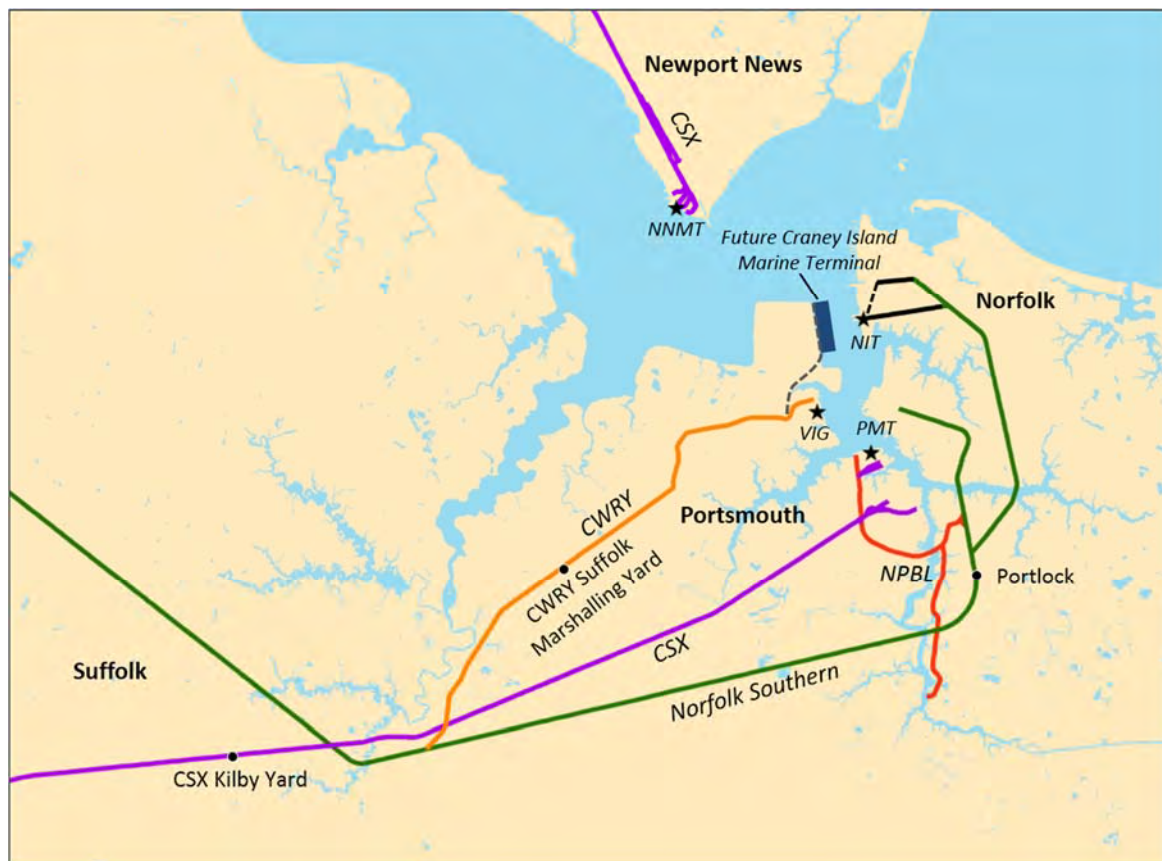


Figure 1 – Primary Hampton Roads rail corridors used by Port of Virginia cargo

Virginia International Terminals (VIT) is the sole operator of the Commonwealth's terminals, allowing it to strategically align activities to the terminals best suited for those activities. Typically, U.S. seaports are "landlord" ports that host privately leased and operated independent terminals that compete against each other. Supported by substantial investments in rail infrastructure, The Port of Virginia is competitively positioned to provide the access to international trade lanes that factor into ship lines' and railroads' strategic decisions to route cargo through a port. This position can be further enhanced through improvements to rail service at the Port facilities and the railroad-owned corridors that convey its cargo to inland markets.

Table 2 illustrates the very significant Commonwealth and federal rail investments that have benefitted The Port of Virginia. Due to the highly competitive nature of the global freight industries, comparable levels of rail investments are underway at or near many of the major U.S. seaports.

Table 2 – Combined Federal & Commonwealth Investments (Approx.) Benefitting the Port of Virginia

PROJECT	TOTAL PUBLIC & PRIVATE INVESTMENT (IN AND OUTSIDE VIRGINIA)	FEDERAL INVESTMENT (VIRGINIA)	COMMONWEALTH INVESTMENT (EXCLUDING PORT FUNDS)
FHWA-NS Heartland Corridor Doublestack Clearances	\$191 M	-	\$75.6 M
DRPT-Commonwealth Railway Relocation	\$75 M	\$15 M	\$34.6 M
CSX National Gateway	\$850 M	-	\$40 M
NS Crescent Corridor	\$2,500 M	-	\$49.3 M
Norfolk Passenger Rail / Heartland Corridor	\$100 M	\$15 M	\$87 M
On-Dock Rail and Other Supporting Infrastructure	\$53 M	-	\$22.6 M

Grants and other funding mechanisms offered through the Commonwealth are typically accompanied by commitments to report and achieve specific and quantified performance goals, such as annual rail traffic, travel time reductions, or other metrics tailored to the anticipated benefits of the project. The above investment totals exclude other incentives such as tax credits offered by the Commonwealth to further encourage economic activities that contribute to its goals, including port and rail activities.

1.2. Master Rail Plan

The Master Rail Plan is built on the following major assumptions and findings:

- The vast majority of rail cargo through The Port of Virginia's marine terminals is containerized, intermodal cargo
- Intermodal rail service provides The Port of Virginia an opportunity to access major Midwest markets and new market sectors.
- Norfolk International Terminals (NIT), Virginia International Gateway (VIG), and a planned future marine terminal on Craney Island are The Port of Virginia's primary opportunities for intermodal rail service.

- Other Port facilities have the potential to support development of other rail-served markets, such as agriculture or other commodities.
- Rail-related developments outside The Port of Virginia facilities could have a significant impact, directly or indirectly, on Port facilities and operations.

Planning efforts to support rail freight are complicated by the competitive environment within which this activity takes place, where business plans are closely held by all stakeholders (ship lines, railroads, the Port, and their customers).

The Master Rail Plan therefore identifies impacts, constraints, recommendations and other considerations regarding increased rail traffic on a terminal by terminal basis.

1.3. Master Rail Plan Findings

While this Master Rail Plan is organized around operational and capital improvements at individual marine terminals, it also is based on a pragmatic understanding of competitive dual rail access that is appropriate, affordable and achievable. Two Port of Virginia terminals, NIT and VIG, currently handle the vast majority of containerized cargo, of which, VIG provides competitive dual rail access. At NIT, NS enjoys a competitive advantage as it owns a rail line leading directly into the NIT complex. CSX accesses NIT utilizing the Norfolk and Portsmouth Belt Line Railroad (NPBL), which was formed over 100 years ago by the Class I railroads (of which, NS and CSX are the sole remaining shareholders) to improve level of service to rail-served industries in Hampton Roads. This introduces additional rail operations for CSX to access the terminal. NS's advantage has thus far limited CSX rail demand at NIT to relatively low volume project, bulk, and break-bulk cargo.

The Port and the Commonwealth are managing the reopening of the Portsmouth Marine Terminal and the possibilities of growth at VIG and/or a future marine terminal on Craney Island in such a way as to preserve or promote a climate of competitive dual rail access to the extent feasible (and as may be constrained by trackage rights outside the terminals).

The findings and recommendations of the Master Rail Plan are intended to preserve, promote and enhance the competitiveness of The Port of Virginia, including improvements to competitive dual rail access where practical.

1.3.1. Intermodal Rail

The Port's capacity to transfer containers between the ship lines and railroads at a sufficient level of service to meet customer requirements is an interaction of several elements, each of which may be constrained by different factors. Major capacity elements include:

- Availability and productivity of Port resources (labor, container handling equipment)
- Availability of railroad resources (rail cars, locomotives, crews)
- Availability of U.S. Customs and Border Protection (CBP) resources to screen import cargo
- Alignment of Port, railroad, and CBP resource availabilities

- Port and railroad infrastructure and operational capacity to support the full range of cargo activities
- Impacts of Port and rail activities on the surrounding communities and the affected industries

At The Port of Virginia, the coordination of many of these elements have a private and/or competitive element and are worked through in confidential settings with limited public transparency.

Within this environment, the Master Rail Plan includes the following findings, observations, and related issues:

Table 3 – Summary of Observations

OBSERVATION	DISCUSSION
The Master Rail Plan acknowledges that resource allocations are made outside of the Master Rail Plan by the Port Authority and the General Assembly. Resource allocations by the railroads, both capital and operating, are private business decisions.	The Commonwealth and the U.S. Government have invested more than \$300 million in public funds to support rail infrastructure supporting the Port, alongside equivalent federal investments in the Heartland, National Gateway and Crescent rail corridors benefitting the Port.
Trackage rights can introduce complexities to providing dual access to facilities that precludes readily apparent solutions from being viable.	Trackage rights are regulated at the federal level and there is very limited ability to compel a railroad to grant competitive access to another railroad. Existing trackage rights, particularly on the rail networks serving facilities in Hampton Roads, are fairly complicated. It is not uncommon for entities seeking improved rail access to suggest solutions that involve expansion of trackage rights, either due to being unaware of existing rights, or not fully appreciating the magnitude of the request.
U.S. Customs and Border Protection (CBP) personnel work closely with the Port to provide the support necessary to maintain the stream of commerce through the terminal, to the extent their own labor policies and resources can manage. Despite local CBP Field Office's best efforts, these resources are not always sufficient to provide the coverage the Port may require at the marine terminals.	• CBP labor policies and resource availability limit its ability to adjust screening coverage to meet the changing and day-to-day needs of Port operations. • As rail demand increases, additional CBP resources may be necessary to support rail operations at the Port. • Infrastructure improvements at NIT and VIG are available to reduce the manpower resources required to meet CBP screening requirements. • The burden of funding these improvements has shifted to the Port.

OBSERVATION	DISCUSSION
	• The 2014 Consolidated Appropriations Act establishes a possible, but not a definite, mechanism for the Port to provide supplementary funding to CBP.
Alignment of Port, railroad, and CBP resources is typically coordinated at the local level. However, many key decisions affecting local operations are made at the regional or national levels.	• As one example, the schedule for CSX trains at VIG is compressed by the national and regional schedules for passenger trains and to a lesser degree freight trains due to the mainline track capacity shortages between Richmond and Fredericksburg. • The Port and CBP have limited resources to support this schedule, resulting in reduced level of Port and CBP service for CSX cargo. • This places pressure on the Port and CBP to allocate additional resources. • Operational solutions may be feasible if coordinated among all stakeholders.
Investment in rail infrastructure is a common solution to Port rail capacity concerns, but may not be the only solution.	• The Port, the Commonwealth, and railroads routinely plan and invest in infrastructure improvements through their respective capital programs, special appropriations, and dedicated funding sources such as the Rail Enhancement Fund. • Conversely, resources to support coordination of interdependent freight and passenger rail operational services among the railroads, the Port and CBP are generally not available. • An entity focused on supporting freight-related concerns within the state, such as OIPI or a new Office of Freight Planning, as have been successful in other states, may be useful for coordinating and advocating solutions between stakeholders.

OBSERVATION	DISCUSSION
The resources and obligations of the railroads and the Port are focused on supporting the movement of freight and often do not address resultant community or individual business impacts.	• Increasing rail traffic to and from the terminals results in increased traffic delays at rail crossings throughout Southside Hampton Roads. • Southside Hampton Roads rail traffic, including Port intermodal traffic, converges through downtown Suffolk. • Expansion of Commonwealth Railway's infrastructure to support VIG may require relocation of two large water pipelines owned by the City of Norfolk and the City of Portsmouth. • Resources and plans to mitigate community or individual business impacts of Port rail activities are inconsistent and/or deficient. • Clear guidelines to establish grade separation needs and funding would benefit the Port, the surrounding communities, and the railroads.

1.3.2. Dual Rail Access

Dual rail access can be provided through several different means. Whether these conditions provide the opportunity for the customer to have the railroads effectively compete with one another is largely dictated by the specifics of the site and the rail network serving it. Table 4 summarizes these various forms and likely constraints to establishing competitive service associated with each. A significant limitation to concepts that seek to provide dual rail access through expansion of trackage rights is that granting such trackage rights is strictly between the railroads and is a matter of interstate commerce outside the jurisdiction of the state to compel.

Table 4 – Constraints to Competitive Dual Rail Service for Various Forms of Dual Rail Access

ON-DOCK DUAL RAIL ACCESS PROVIDED BY	PHYSICAL AND OPERATIONAL CONSTRAINTS TO COMPETITIVE DUAL RAIL SERVICE
Both railroads operating over the same infrastructure (i.e. trackage rights) to a terminal	- Increased complexity to coordinate operations may adversely impact effective capacity of the rail infrastructure and/or cost of operation; may require additional infrastructure to achieve a desired throughput. - Prioritization of traffic between the railroads may not be optimally aligned with the needs of the Port.
Direct access by one railroad and access by the second through an intermediary (short line) NIT: NS, CSX via NPBL PMT: CSX, NS via NPBL POR: CSX, NS via CSX NNMT: CSX, NS via CSX	- Introduces additional operations (costs) for the non-owning railroad to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be effectively aligned with the needs of the Port.
A common carrier (short line) transporting both railroad's trains to a terminal. VIG: Both NS and CSX via CWRV	- Introduces additional operations (costs) to rail service (relative to a single provider) due to the need to interchange with a second railroad. - The impact of this service to the overall competitiveness of the operation is dependent on the nature of underlying service charters or other agreements between the common carrier, port, and Class I railroads. - May require additional infrastructure on part of the short line and/or the terminal to segregate rolling stock.
Separate rail infrastructure for each railroad	- May require significant footprint within terminal to accommodate. - Rail corridor construction is an enormous undertaking, particularly in urbanized areas (significant community impacts).

Measures to mitigate the operational and physical constraints to competitive dual rail access need to be evaluated in terms of the overall competitive position of the Port (i.e. the cost of mitigation vs. the benefit of doing so). Potential means for the Port to improve its competitive position through mitigation of existing rail access conditions is **an overall port-wide approach to competitive dual rail access** that includes:

- Strategic alignment of ship lines, where possible, to maximize availability of rail capacity for those ship lines with significant rail cargo (in consideration of multiple complex factors, of which rail is only one element).
- Ongoing coordination among the Port, railroads, and other stakeholders (e.g. U.S. Customs and Border Protection) to align resources and seek process optimizations that benefit all parties.
- Improved utilization of off-dock intermodal yards via drayage or barge service, if unable to meet demand with on-dock rail.
- For locations where tenant development is being sought (e.g. PMT) and may have tenants served by different railroads, development operating procedures and strategies to coordinate tenant operations and define expectations for level of service.
- Strategic investments in infrastructure where operational constraints cannot be overcome.

1.3.3. Other Rail Opportunities

There is potential to support other rail-served activities at several of the Port's facilities, including Portsmouth Marine Terminal (PMT) and Port of Richmond (POR). To this end, the Master Rail Plan includes the following observations:

- The Port has thus far remained open to a broad range of prospective industries, for example bulk agricultural exports or automobile imports.
- The unique needs of each industry and the potential for operational conflicts limits the opportunity to fully plan development of the Portsmouth or the Richmond terminals without a long-term commitment to one or more targeted industries or activities.
- The Port generally has the capacity and willingness to assist prospective industries with developing on-terminal solutions.
- Other economic development entities may be better positioned and have the necessary resources to assist prospective industries with developing off-terminal elements of a new operation.
- Realization of major industrial development opportunities can be improved through further coordination between on- and off-terminal improvements where proposed operations cannot be wholly accommodated on-terminal.

As with all aspects of transportation, infrastructure and operational needs are driven by public and private land use decisions. The Port has the clear authority to plan, fund and regulate on-terminal land uses. However, seaports are part of a global supply chain connecting disparate activities and bringing producers and consumers together in a competitive and increasingly efficient manner. All seaports are directly affected by the location and intensity of production, distribution and consumption activities outside the individual marine terminal.

Virginia was one of the early pioneers in stimulating rail-related economic development through the Virginia Inland Port in Front Royal. Equivalent opportunities exist today outside the gates of the Portsmouth Marine Terminal and the Port of Richmond. However, the ability, resources, and authorization for such initiatives are likely best found through collaboration among The Port of Virginia, the Virginia Economic Development Partnership, and supporting local and regional agencies, provided the Commonwealth develops clear benchmarks and goals to guide those efforts.

1.4. Recommendations

Traditional transportation plans yield a map with specific capital improvements. ***This Master Rail Plan follows a period of significant capital investment in rail and rail-related facilities, and the immediate priority of this Master Rail Plan is earning an appropriate level or rate of return on those prior rail investments, better collaboration among major stakeholders, and a process for ongoing operational improvements, out of which additional infrastructure improvements may be identified.*** However, this Rail Master Plan also contains a list of potential capital improvements (Recommendation 4) which should be considered in light of the more immediate operational, administrative, and strategic decision making recommendations (Recommendations 1-3).

Recommendation 1: State planning and investment in rail infrastructure serving the Port should maximize utilization of existing rail and rail-related infrastructure among all parties.

- Designate an existing entity (e.g. OIPI) or create a new entity (e.g. Office of Freight Planning) to facilitate continuous and comprehensive coordination efforts among the Port, railroads, passenger rail, U.S. Customs and Border Protection, and other stakeholders to optimize rail service to the Port through improved alignment of schedules and resources. Similar efforts have been successful at other U.S. ports and in the Virginia I-95 rail corridor.
- The Port should provide regular input to, and collaborate with, this entity to evaluate and establish achievable and sustainable goals for rail intermodal service across the entirety of the Port.
- Focus of these efforts should include identification of critical infrastructure needs that are not readily apparent to any one stakeholder, conducting more accurate benefit/cost assessments, development of analytical tools and supporting data collection to support better decision making, and exploring cost-and risk-sharing opportunities.
- Designated entity should also regularly review public funding programs for rail, port, and highway infrastructure and operations to ensure that operational enhancements, such as use of mechanisms to provide supplemental funding to U.S. Customs and Border Protection operations, receive due consideration in such programs.
- A wide variety of performance expectations, performance incentives, and performance standards have been established as justification for public investment in rail infrastructure. The Commonwealth and the Port should ensure, in a transparent and collaborative fashion, that those expectations, incentives and standards all contribute to the overall goals of The Port and the Commonwealth.

Recommendation 2: Develop policies and/or programs to support local infrastructure planning and investment where rail activity occurs.

- Designate a lead individual or entity to explore programs to assist communities with coordination, planning, and funding of improvements to mitigate rail impacts, including quiet zones, crossing safety improvements, and grade-separated crossings, with short-term emphasis on the Commonwealth Railway corridor and Class I corridors in the vicinity of the CWRV interchange.

Similar programs adopted by other states include California's Section 190 Grade Separation Program and North Carolina's Sealed Corridor Project.

- Designate a lead individual or entity (e.g. the entity designated in Recommendation 1) to explore program options for ensuring that existing, rail-served industries are not disadvantaged by other rail projects and programs.

Establish a process for the Commonwealth to develop guidelines and metrics for use in prioritizing and justifying community and industrial mitigation efforts.

Recommendation 3: Where opportunities to foster Port-served private industrial activities are present, maximize the value of Port assets by improving coordination of on- and off-terminal development.

- Given the value and scarcity of Port property and the access it provides to deep draft vessels, the Port should evaluate, on a case-by-case basis, the extent to which it accommodates prospective private rail-served industrial operations within its terminal boundaries. If the Port determines an attractive operation cannot be wholly accommodated within a terminal, a lead individual or entity such as VEDP or DRPT should be designated to coordinate roles, responsibilities, and resources among stakeholders to evaluate and develop off-terminal rail facilities that could support realization of the opportunity.
- The designated lead individual should use this Master Rail Plan to assist with the identification, coordination, and development of off-terminal needs.
- Off-terminal development plans should seek to support other terminal rail activities where feasible and practical to maximize potential use as rail needs evolve over time.
- Off-terminal rail development plans should preserve the opportunity for competitive dual rail access to the terminal(s) it supports.

Recommendation 4: The Master Rail Plan identifies off-terminal impacts and constraints as intermodal rail traffic increases at NIT, VIG, PMT, and a future marine terminal. The following efforts will support near-term competitive improvements or community relief for intermodal rail activities, provided that the host railroad accepts the improvements and any associated conditions, and that planned terminal expansions occur as currently planned.

4A - Norfolk International Terminal (NIT)

- Double-tracking the rail line between Portlock and NIT would lower operational costs for NS, NPBL, and other railroads that all use the line. NOTE: This recommendation is not currently supported by NS based on existing rail volumes.
- A direct connection between Lambert's Point line used by NPBL and the rail line to NIT once existed; reconstructing it would improve access for NPBL to serve its customers on the Sewell's Point Line. NOTE: This recommendation is not currently supported by NS based on existing rail volumes.
- Establish storage for a complete unit train (i.e. no breaking) on NPBL system in order to more efficiently stage longer trains.

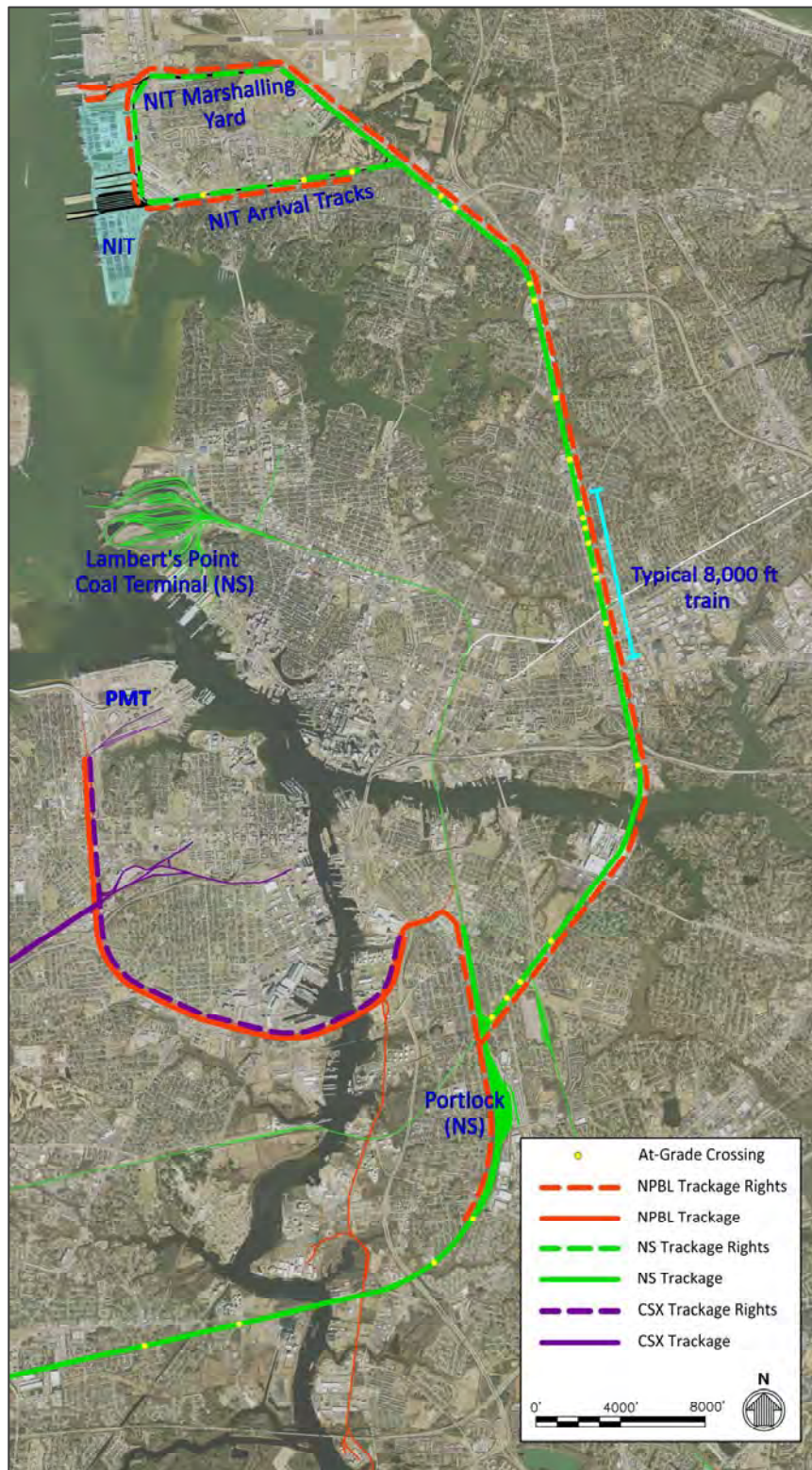


Figure 2 – NIT Overall Rail System

4B - Virginia International Gateway (VIG)

- Commonwealth Railway (CWRV) corridor should be double-tracked along its full length to support increased rail traffic at VIG.
- CWRV's Suffolk Marshalling Yard should have two additional tracks constructed (already partially funded by an REF grant).
- The interchange between CWRV and the Class I railroads in Suffolk should be evaluated for improvements.
- Related community impacts resulting from increased rail traffic should be identified and mitigated through the program described in Recommendation 2.¹

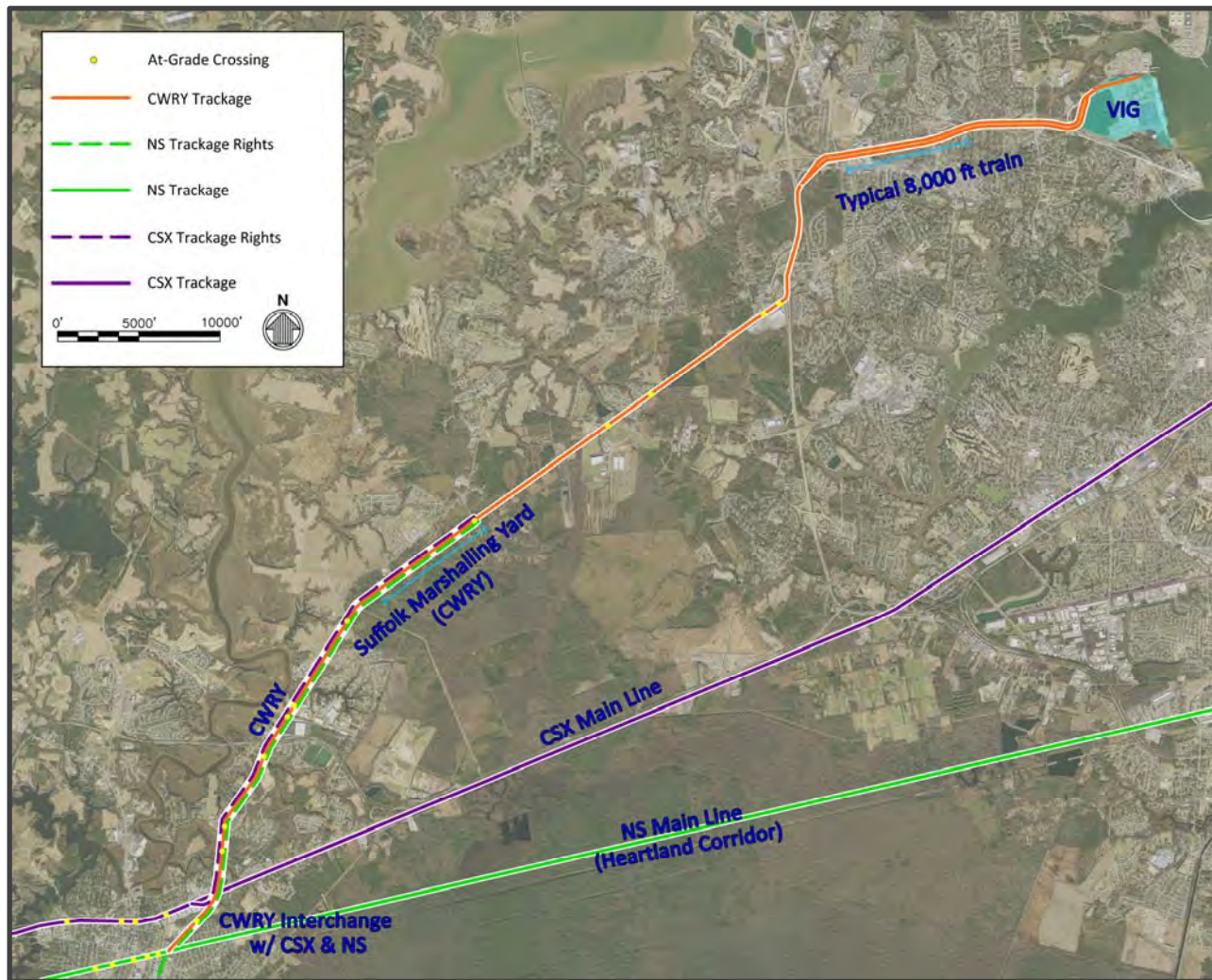


Figure 3 – VIG Overall Rail System

¹Improvements to mitigate long term traffic mobility impacts resulting from increased rail traffic, including traffic generated by VIG and CIMT have been identified in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015.

4C - Portsmouth Marine Terminal (PMT)

- If competitive rail operations are established at PMT, improvements to circumvent the physical constraints of the Pinner's Point interchange could mitigate some potential rail conflicts. This would likely require off-terminal property to construct.
- There are likely on-terminal solutions to mitigate rail conflicts on the east lead, once Midtown Tunnel construction is complete, but those will depend on any on-terminal activities or users.



Figure 4 – PMT Overall Rail System

4D - Newport News Marine Terminal (NNMT)

- Engagement with CSX to address vertical clearance restrictions on the Peninsula Subdivision that currently limit the height of rail cars (in particular, multi-level automobile carriers) would allow the Port to more effectively compete for automobile cargo and other breakbulk cargo through NNMT.

4E - Future Craney Island Marine Terminal (CIMT)

- Property for the rail corridor needs to be acquired.
- A significantly larger CWRV marshalling yard will be necessary to support CIMT at full build out. A process to identify potential sites for this yard should be initiated.
- Improvements will be needed near VIG to allow CIMT traffic to pass while trains arrive at or depart from VIG.
- Related community impacts must be identified and resolved¹.

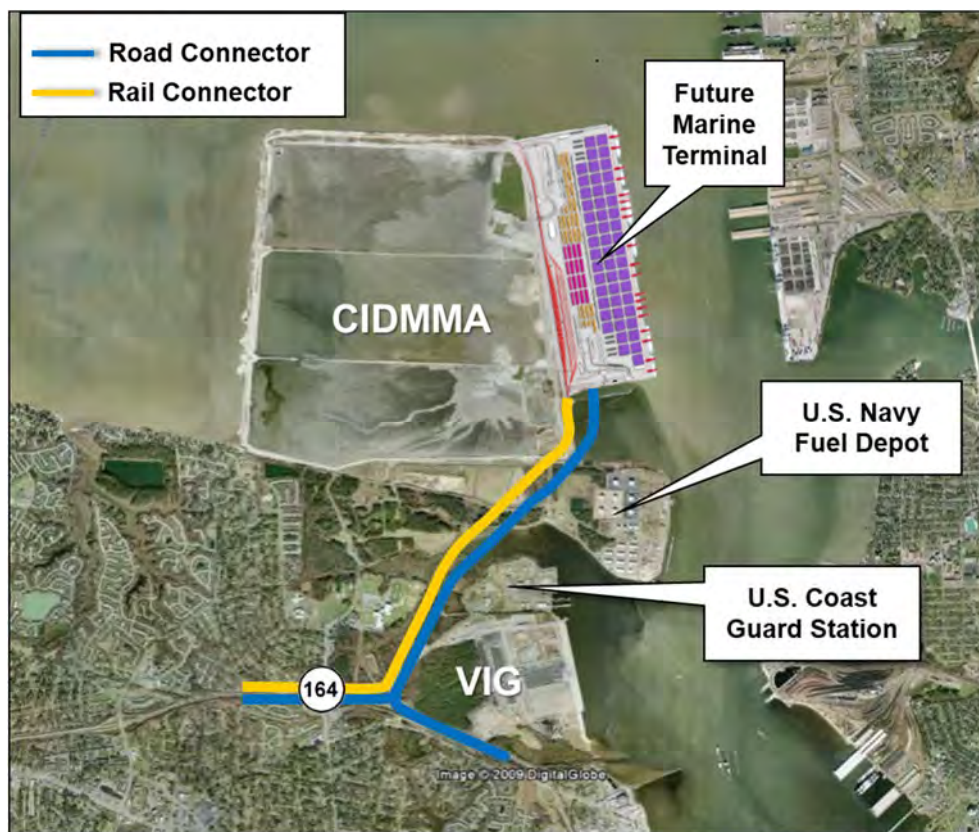


Figure 5 – Craney Island Road and Rail Connector Concept

While the above efforts are intended to improve the competitive position of The Port of Virginia, the improvements recommended herein would be above and beyond the considerable progress made in 2014 to maintain the longstanding success of The Port of Virginia.

¹Improvements to mitigate long term traffic mobility impacts resulting from increased rail traffic, including traffic generated by VIG and CIMT have been identified in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015.

2. INTRODUCTION

The Virginia General Assembly passed Senate Joint Resolution 69 in March 2014, requesting the Office of Intermodal Planning and Investment (OIPI), in consultation with the Department of Rail and Public Transportation (DRPT) and the Virginia Port Authority (VPA), to develop a Master Rail Plan for the principal facilities of The Port of Virginia. The Port of Virginia facilities considered are shown in Figure 6.



Figure 6 – Current and future Port of Virginia facilities

2.1. Background

The Port of Virginia

The Virginia Port Authority was established by the Commonwealth in 1952 to foster maritime commerce and economic development within Virginia by coordinating and promoting the port activities of the city-owned marine terminals. In the 1970's, the marine terminals (owned by the cities of Newport News, Portsmouth, and Norfolk) were consolidated under the Virginia Port Authority to further bolster their economic development potential and in the 1980's, terminal operations were consolidated through the formation of Virginia International Terminals, Inc. (VIT). In 1989, the Virginia Inland Port (VIP) was created to extend access to the Port inland and in 2010, the VPA began leasing the APM Terminal (now the Virginia International Gateway (VIG) in Portsmouth and the Port of Richmond's Deepwater Terminal (POR). For

the purposes of this report, these facilities and organizations (which have undergone further consolidation in 2014), are referred to as The Port of Virginia. Outside of this report, other documents have used the terms “Port of Virginia” or “Port of Hampton Roads” to refer to all of the maritime industries in Virginia, including but not limited to the coal, agribusiness, dry bulk, oil, and other general cargo terminals.

The organization of The Port of Virginia is somewhat unique in that its terminals work together and provide the opportunity to align ship lines with the terminal resources that best serve their needs. Typically, ports in the U.S. (e.g. LA/Long Beach, NY/NJ), each terminal typically acts as a private entity that competes with the other local terminals for ship calls.

The Railroads

Prior to 1898, Hampton Roads industries, including its myriad marine terminals, were served by eight railroads resulting in significant rail congestion. In 1898, the Norfolk and Portsmouth Belt Line Railroad (NPBL) was formed by these railroads with shares held by each of the interested railroads as a means to improve the level of service for all the rail customers. Since that time, multiple mergers have occurred, resulting in the region having two Class I railroads, Norfolk Southern (NS) and CSX Transportation (CSX). NPBL remains with NS and CSX as the sole shareholders. There are three short line railroads that also operate in the Hampton Roads area: Commonwealth Railway (CWRY), Chesapeake & Albemarle Railroad (CA), and the Bay Coast Railroad (BCR).

The trackage of these railroads extend throughout the Hampton Roads area, with trackage rights agreements and associated rate contracts between the railroads shaping the cost for rail service. Similar conditions are present in Richmond as well. At a high level, the presence of both NS and CSX gives businesses options for accessing inland markets and manufacturing centers. The viability of these options, however, is greatly shaped by the ease (cost) to transfer cargo locally between a railroad and the business. The Port of Virginia terminals, which are located throughout the state, therefore each have different options with regard to competitive rail options.

The rail network serving The Port of Virginia is not a simple grid, and just as The Port of Virginia competes for global cargo, the railroads compete for cargo at The Port of Virginia and the right to move that cargo on their private rail infrastructure. Figure 7 begins to illustrate the complexity of the rail network serving The Port of Virginia’s Hampton Roads facilities.

This competition for cargo is further part of the larger competitive environment where both ship lines and the railroads make strategic decisions regarding vessel schedules and pricing. These decisions ultimately affect the Port's competitiveness but are outside the Port's ability to fully control.

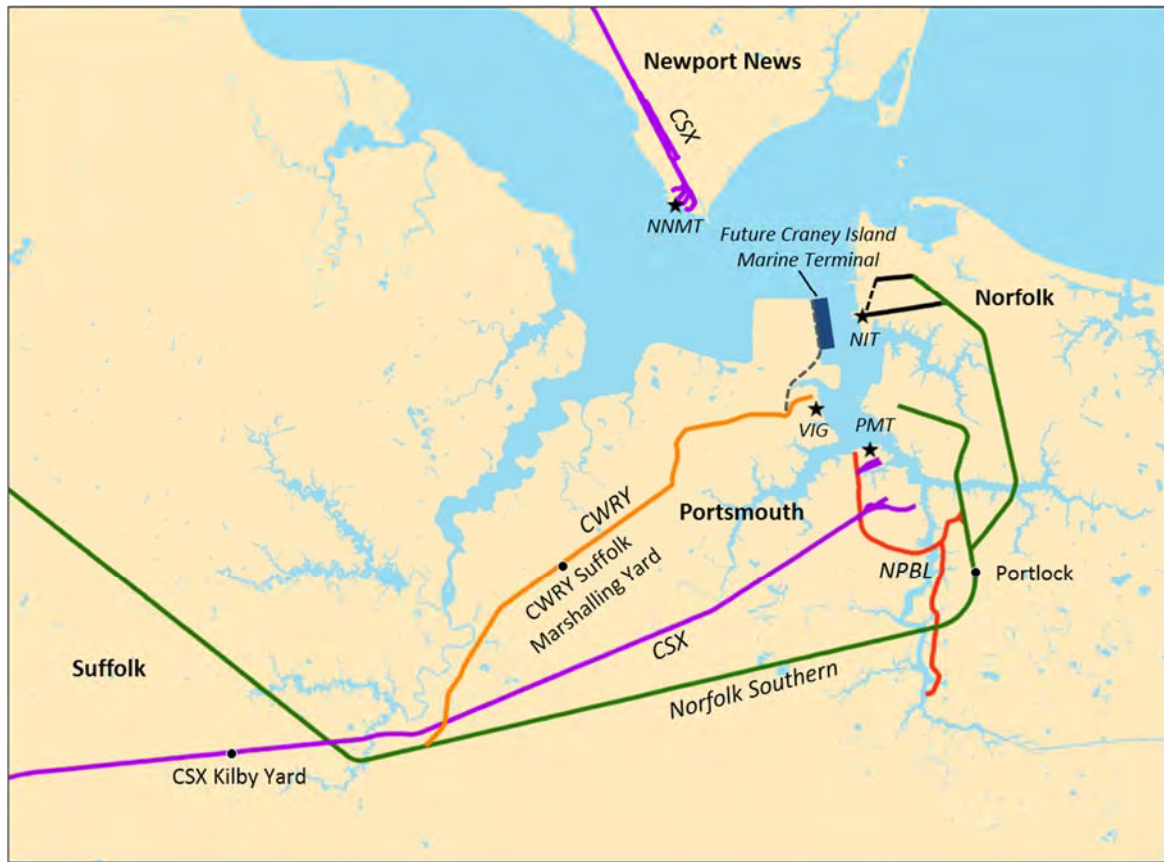


Figure 7 – Primary Hampton Roads rail corridors used by Port of Virginia cargo

While the Master Rail Plan considers the movement of containerized, bulk, and break bulk cargo through The Port of Virginia, some of the most significant master plan issues relate to the import and export of containers through The Port of Virginia – a highly competitive global industry, as illustrated by Table 4.

Table 5 – U.S. East Coast Port 2013 throughput

SEAPORT	NEW YORK	BALTIMORE	VIRGINIA	CHARLESTON	SAVANNAH	MIAMI
2013 TEU	5,467,345	705,230	2,223,532	1,601,366	3,034,010	901,454
2013 % Rail Cargo	~14%	10% goal	~34%	10% goal	~22%	10% goal

Source: AAPA and individual ports

Supported by substantial investments in rail infrastructure, The Port of Virginia is competitively positioned to provide the access to international trade lanes that factor into ship lines' and railroads' strategic decisions to route cargo through a port. This position can be further enhanced through improvements to rail service at the Port facilities and the railroad-owned corridors that convey its cargo to inland markets.

Table 5 illustrates the very significant Commonwealth and federal rail investments that have benefitted The Port of Virginia. Due to the highly competitive nature of the global freight industries, comparable levels of rail investments are underway at or near many of the major U.S. seaports.

Table 6 – Combined Federal & Commonwealth Investments (Approx.) Benefitting the Port of Virginia

PROJECT	TOTAL PUBLIC & PRIVATE INVESTMENT (IN AND OUTSIDE VIRGINIA)	FEDERAL INVESTMENT (VIRGINIA)	COMMONWEALTH INVESTMENT (EXCLUDING PORT FUNDS)
FHWA-NS Heartland Corridor Doublestack Clearances	\$191 M	-	\$75.6 M
DRPT-Commonwealth Railway Relocation	\$75 M	\$15 M	\$34.6 M
CSX National Gateway	\$850 M	-	\$40 M
NS Crescent Corridor	\$2,500 M	-	\$49.3 M
Norfolk Passenger Rail / Heartland Corridor	\$100 M	\$15 M	\$87 M
On-Dock Rail and Other Supporting Infrastructure	\$53 M	-	\$22.6 M

Grants and other funding mechanisms offered through the Commonwealth are typically accompanied by commitments to report and achieve specific and quantified performance goals, such as annual rail traffic, travel time reductions, or other metrics tailored to the anticipated benefits of the project. The above investment totals exclude other incentives such as tax credits offered by the Commonwealth to further encourage economic activities that contribute to its goals, including port and rail activities.

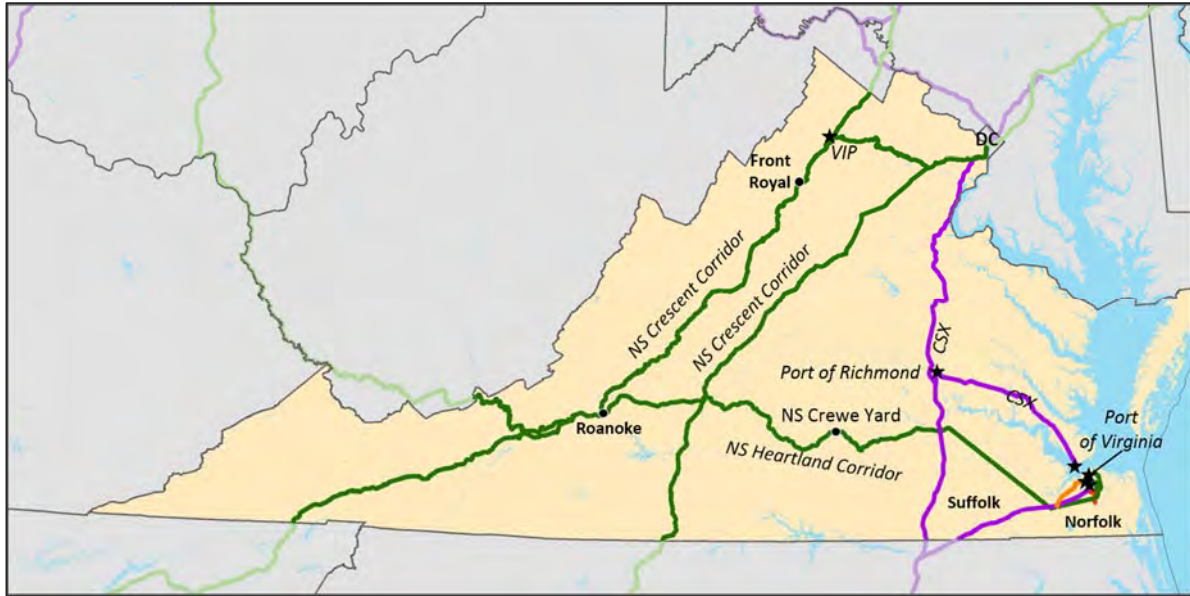


Figure 8 – Primary Virginia rail corridors for Port of Virginia cargo¹

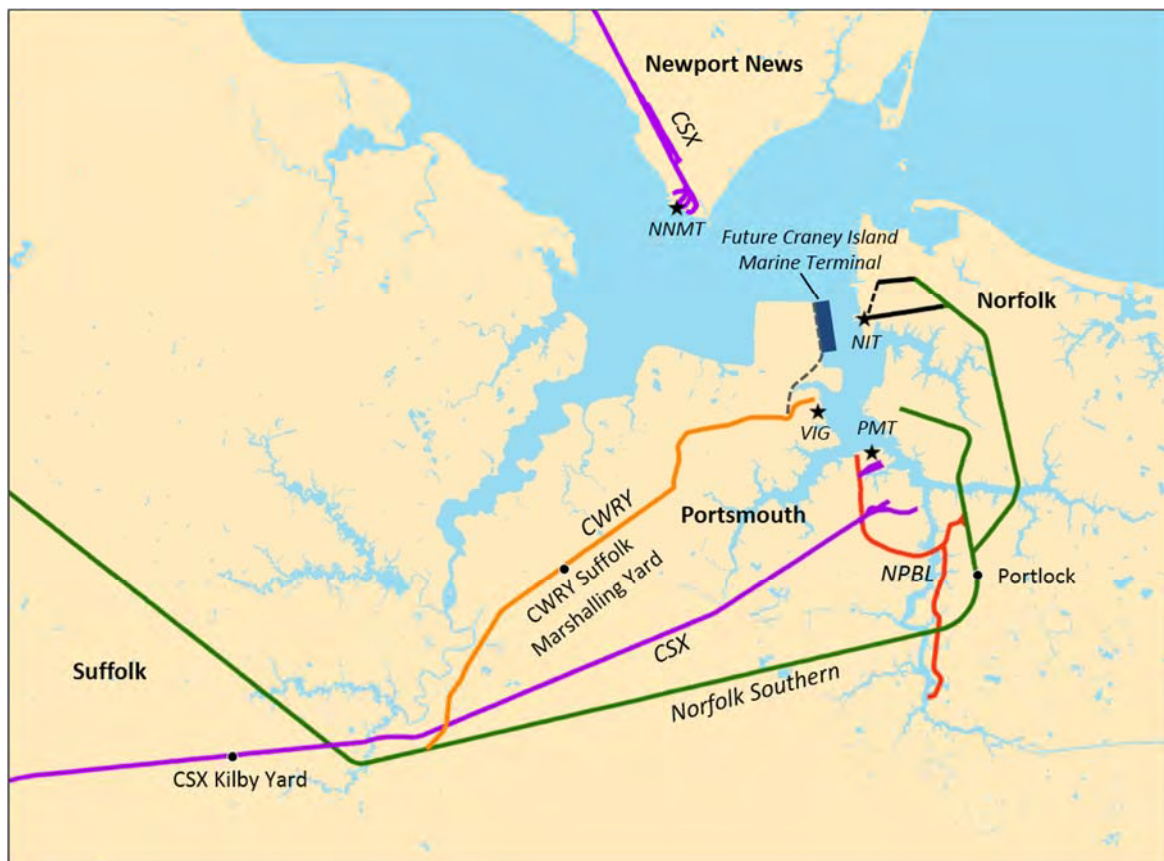


Figure 9 – Primary Hampton Roads rail corridors used by Port of Virginia cargo

¹Figure 8 depicts the primary corridors used by cargo passing through Virginia Port Authority-owned or operated facilities and is not a complete illustration of the rail corridors within Virginia.

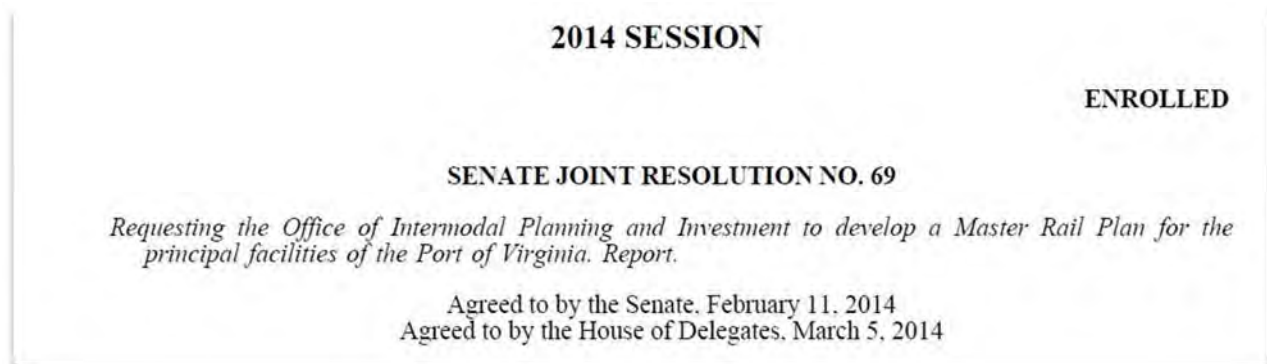
Looking Ahead

Inland rail-served markets (e.g. the population and manufacturing centers in Chicago and Ohio) can be competitively served by multiple East Coast ports (i.e. the total landed cost to transport cargo between ports and these markets by rail is close enough to allow ship lines and railroads consider more than one port facility as the transfer point). This cargo is often referred to as discretionary cargo (i.e. the ship lines, working with the railroads, can choose which port this cargo will pass through to reach its destination). Ship lines shifting container deliveries from New York to Norfolk during Hurricane Sandy and more recently, the severe winter weather in early 2014, illustrates this elasticity of substitution between ports. Attracting discretionary cargo to The Port of Virginia is achieved by minimizing the cost and maximizing the reliability of the transfer between the ship lines and the railroads.

A major trend in ocean shipping is the transition to larger container vessels and the need to minimize the number of port calls to maximize the utilization of ship capacity (i.e. the function of a container ship is to transport cargo. When it is in port, it is not transporting cargo and not earning revenue, so therefore the desire is to minimize its time in port). The Port of Virginia is one of the few East Coast ports capable of accommodating the depth and height of these new, larger vessels. However the road and rail connections may get stressed from the cargo “surges” resulting from these new and larger vessels.

Strategic improvements to rail access and capacity at its terminals will continue to enhance The Port of Virginia’s competitiveness. As demand for rail increases at Port facilities, a coordinated effort to support this demand and mitigate impacts to the surrounding communities will be necessary. The General Assembly, in recognition of this interrelationship between Port facilities, the private rail infrastructure supporting it, and the communities within which this activity occurs, initiated this effort to develop a Master Rail Plan for The Port of Virginia.

2.2. Senate Joint Resolution 69



Senate Joint Resolution 69 (SJR 69) directs OIPI, in consultation with DRPT and VPA, to develop a Master Rail Plan for The Port of Virginia to address the following:

- 1) The status and characteristics of the current rail systems that support the port facilities.
- 2) The development of a rail master plan with the flexibility to support both near- and long-term business opportunities at the port facilities.

- 3) The identification of any operational and physical constraints or limitations on providing efficient and competitive dual rail access service to the port facilities and recommendations to mitigate them to the extent practicable.
- 4) The identification of any improvements to rail access to the port facilities and related intermodal facilities to support desired train volumes.
- 5) The identification of potential increases to the port facilities' intermodal rail throughput capacity as demand increases.
- 6) Strategic recommendations to guide future rail planning and funding decisions to support desired train volumes.

OIPI is further directed to develop the Master Rail Plan with input from Virginia freight rail operators, local governments, regional authorities, other affected entities, and interested parties.

Within the context of the Master Rail Plan, "competitive dual rail access service" is defined as the opportunity to select between two railroads to transport cargo and where each railroad will compete for the service on the basis of price, speed of delivery or service quality/reliability. The assumption is that in this environment, competitive pressure is placed on both railroads to offer the best price schedule and level of service feasible, resulting in the lowest cost or best value to the cargo owner.

2.3. Relationship to the Virginia Statewide Rail Plan

The Virginia Statewide Rail Plan (VSRP) was prepared by DRPT *to provide a defined vision for rail transportation in the Commonwealth of Virginia*. It further provides the formal input for state-funded rail projects into the Commonwealth's Six-Year Improvement Program and the statewide multimodal long-range plan known as VTrans2035. The VSRP addresses both freight and passenger rail needs in the state.

The VSRP was also developed to comply with the federal Passenger Rail Investment and Improvement Act of 2008 (PRIIA), which requires a Federal Railroad Administration-approved state rail plan to qualify for federal rail funding (both passenger and freight projects). This Act is currently under review and reauthorization by Congress.

The Master Rail Plan for The Port of Virginia is intended to assist with subsequent planning efforts of those portions of the state's rail network used to transport cargo to and from The Port of Virginia's facilities. Increasing rail throughput at a specific terminal may need to be supported by off-terminal infrastructure improvements to both support that throughput and to minimize daily community impacts. This plan seeks to describe the relationship between port rail activity, the railroad-owned infrastructure supporting it, and the communities that host these activities.

As The Port and the Commonwealth make decisions on where or if it invests in expanded rail capacity, this document can assist the stakeholders in identifying not only other necessary rail projects, but also the potential road projects (e.g. grade separated crossings) that should be considered.

2.4. Planning Parameters

The Master Rail Plan for The Port of Virginia is an initiative by the Commonwealth of Virginia and therefore available for public review and comment. However, it is important to recognize that the Master Rail Plan for The Port of Virginia is based on coordinating strategic business decisions (namely, capital investments) of private entities that exist in competitive environments (i.e. privately-owned railroads and the commercial function of the Port).

The business plans and contracts behind these decisions or specific intent to pursue certain improvements were not made available to the planning team due to the public nature of this document.

This Master Rail Plan therefore describes the relationships between each Port facility and the supporting rail systems to identify impacts to the off-terminal infrastructure and communities if capacity expansion at individual terminals is pursued without presumption of when or if such expansions will be undertaken.

2.5. Port Facilities

The principal facilities of The Port of Virginia included in this Master Rail Plan are:

Norfolk International Terminals (NIT) in Norfolk. This is The Port of Virginia's largest container terminal. Rail access is provided by Norfolk Southern's (NS) Heartland Corridor, as well as CSX Transportation (CSX) through the Norfolk Portsmouth Belt Line (NPBL).

Portsmouth Marine Terminal (PMT) in Portsmouth. This terminal operated as a container terminal until 2010, when operations were transferred to the recently constructed APMT (now VIG). The terminal was reactivated for container and other cargo operations in September 2014. Rail access is provided by CSX as well as NS (through NPBL).

Newport News Marine Terminal (NNMT) in Newport News. This terminal is operated as a general cargo terminal and primarily handles break bulk, project, and Roll-on–Roll-off (Ro-Ro) cargo, such as automobiles. Rail access is provided by CSX with the ability to transfer to NS in Richmond, VA.

Virginia International Gateway (VIG), formerly APM Terminals Virginia, in Portsmouth. This is a private container terminal currently leased and operated by The Port of Virginia through 2030. In 2014, APM Terminals sold the terminal to Alinda Capital Partners and Universities Superannuation Scheme Limited. Rail access is provided by CSX and NS through an operating agreement with the Commonwealth Railway (CWRY).

Virginia Inland Port (VIP) in Front Royal. This is a rail- and truck- served facility established to improve Port access to inland locations via regular rail service to/from the Hampton Roads marine terminals (primarily NIT). Rail service is provided by NS and the terminal is located along the NS Crescent Corridor.

Port of Richmond (POR) in Richmond. POR (also referred to as Richmond Deepwater Terminal), located on the James River, is owned by the City of Richmond and leased to the Virginia Port Authority. It supports regularly scheduled barge service (James River Barge Service) for containers to APMT and NIT. It also

provides general cargo services including break bulk and bulk handling. Rail access is via CSX's South Yard facility, with operating rights on the terminal lead managed by the City of Richmond.

A **Future Marine Terminal** is planned in the future atop the Craney Island Eastward Expansion to support ongoing growth in container cargo volume over the next several decades.

All of the principal port facilities have rail access to one or more rail services – CWRV, CSX, NPBL, and NS – with CSX and NS ultimately providing access to rail markets outside of Virginia.

2.6. Virginia Rail Corridors Important to The Port of Virginia

Port of Virginia rail traffic is primarily conveyed via the following rail lines within Virginia that link port freight to the major intermodal rail corridors developed by the railroads and on to 16 inland rail destinations.

CSX National Gateway rail network consists of a rail corridor between CSX's intermodal yard in Portsmouth, through Suffolk to its north-south corridor along I-95 in North Carolina. The north-south corridor provides connections to The Port of Virginia's Midwest rail markets via Washington D.C. Upon its completion, the network will support intermodal trains with containers stacked two-high.



Commonwealth Railway (CWRV) owns a rail corridor between VIG and the City of Suffolk, where it connects to CSX's National Gateway and NS's Heartland Corridor. Rail access to the future marine terminal on Craney Island will also be provided via this corridor.

Norfolk and Portsmouth Belt Line Railroad (NPBL) was formed in 1898 by eight Class I railroads (of which, NS and CSX are the sole remaining shareholders) to improve level of service to rail-served Hampton Roads industries. Their rail network is located within the urban areas of Portsmouth and Chesapeake, and functions as a link between PMT, the CSX main line, the CSX intermodal facility, and NPBL's Berkley Yard, NS's Portlock Yard, and NIT. The NPBL rail network also provides rail access to numerous private industries in Hampton Roads.



NS Crescent Corridor is NS's primary north-south intermodal corridor between New Jersey and Louisiana, and is used by The Port of Virginia to access its rail markets in Tennessee and North Carolina. The Virginia Inland Port is also located on this corridor.

NS Heartland Corridor provides double-stack intermodal service between the Portlock rail yard Hampton Roads and NS intermodal facilities in Chicago, IL and Columbus, OH. This corridor passes through

Suffolk to Petersburg and Roanoke, and then westward to Ohio via West Virginia. The Heartland Corridor also intersects with NS's Crescent Corridor in Roanoke.

NS Sewell's Point Line links NS's Portlock rail yard in Chesapeake to NIT in Norfolk.

CSX Peninsula Subdivision (Newport News to Richmond) connects NNMT to CSX's rail network in Richmond.

Two other short-line railroads, Bay Coast Railroad and the Chesapeake & Albemarle Railroad, operate within the Hampton Roads area. The Bay Coast Railroad (BCR) offers rail and rail car barge service across the bay to the eastern shore. They interchange with NS and CSX (via NPBL) at Portlock Yard. The Chesapeake & Albemarle Railroad (CA) is owned by Genesee & Wyoming Inc., with a rail corridor extending into North Carolina. CA likewise interchanges with NS and CSX (via NPBL) at Portlock Yard. Neither BCR nor CA are typically used by The Port of Virginia, but both operate on NS's Sewell's Point Line to access Portlock Yard.

2.7. Master Rail Plan Elements

The Master Rail Plan is structured as follows to serve as a functional planning document. A summary of the plan's findings in context to the specific requests documented in SJR 69 is provided in Appendix A.

- **Section 3:** Rail outlook for The Port of Virginia to document the potential opportunity for rail throughput at The Port of Virginia, if supported by sufficient infrastructure.
- **Sections 4 - 6:** Inventory of the existing rail systems associated with The Port of Virginia facilities and statewide rail corridors important to The Port of Virginia to document the existing environment in which rail service currently operates.
- **Section 7:** Rail access commentary to guide any future planning efforts that seek to establish or expand competitive dual rail access at key Port of Virginia facilities.
- **Section 8:** Findings and strategic recommendations for future planning efforts.

3. RAIL OUTLOOK

3.1. Port Forecast

3.1.1. Intermodal

In conjunction with this Master Rail Plan, The Port of Virginia has developed a projection for containerized rail volume through 2040 as shown on Figure 10. Historical rail volumes are also included for context.

The projection is *unconstrained*, as it reflects the anticipated opportunity for rail cargo through The Port. The extent to which this cargo is pursued must be balance the cost of infrastructure and supporting operations, as well as opportunity costs for serving non-rail customers, against the contribution of rail cargo toward The Port's mission.

The projection anticipates the opportunity for a period of high growth in the near term (~2017) due to the expected opening of CSX's National Gateway for double-stack rail service. Average annual growth rate over the whole planning horizon is approximately 3%.

The projection is bounded by +/- 4% uncertainty.

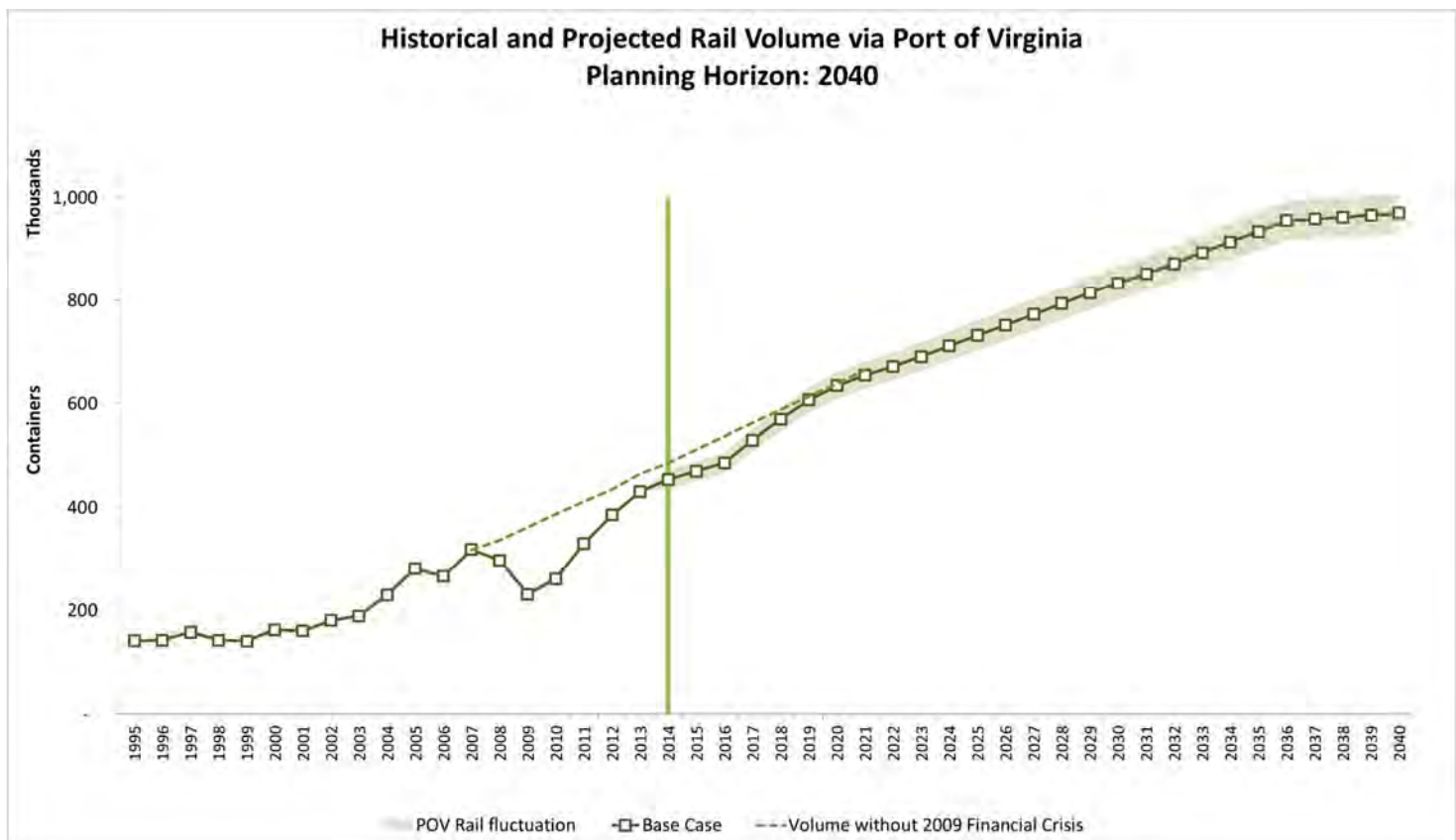


Figure 10 – Historical and Unconstrained Projected Rail Volume via Port of Virginia

Source: The Port of Virginia

3.1.1. Other Rail Cargo

Intermodal rail cargo is the dominant rail traffic generated at Port facilities. Other rail cargo is anticipated but The Port generally does not provide specific projections unless related to a specific commercial opportunity. Overall, The Port typically projects that its non-containerized rail cargo growth will be consistent with Gross Domestic Product (GDP) growth, excluding unforeseen establishment of any major rail-served industry at one of its terminals.

3.2. Private Industry Opportunities

There are opportunities on selected Port of Virginia facilities to accommodate private industry tenants and foster economic development through increased rail/maritime commerce. For industries seeking rail service, specific needs will vary depending on the industry and what defines their competitive environment. Refer to Appendix B for general descriptions of individual industry preferences.

4. PORT AND STATE RAIL INVENTORY

Sections 5 and 6 describes the general rail infrastructure and rail operations associated with the principal facilities of The Port of Virginia. Capacities of the facilities are discussed but not quantified. Rail capacity of a marine terminal is the net result of numerous conditions both on and off the terminal and thus actual capacity is dependent on the specific set of conditions that are present. Estimates of capacity can therefore differ depending on the assumed set of conditions.

Rail capacity of a marine terminal is the net result of numerous conditions both on and off the terminal. Conditions impacting capacity beyond that suggested by the infrastructure include, but are not limited to:

- Availability of labor, container handling equipment, and other associated resources during periods of peak cargo volume.
- U.S. Customs and Border Protection cargo screening processes and protocols.
- The type and condition of cargo (i.e. certain goods tend to require additional screening or processing before they can be cleared to leave the terminal).
- The magnitude of imbalance between import and export cargo volume.
- Operational cost/pricing necessary to sustain a given throughput, and the market response to the associated pricing.
- Utilization of rail car capacity and train crew availability.
- Frequency and length of train traffic, particularly along segments where multiple railroads operate across each other's routes.
- Ability to coordinate arrival and departure of ships, trains, and trucks.
- The degree to which cargo volume is dependent on the time of year (seasonality).

The ability for a terminal operation to handle rail containers is typically constrained by how many "lifts" the operation can do in a given time period. A lift represents a machine handling a container, regardless of the size of the container. Capacity in this report is therefore expressed in containers.

Since standard containers come in 20-ft, 40-ft, and 45-ft lengths, another common metric is the twenty-foot equivalent unit (TEU), which expresses container volume in terms of 20-ft containers (i.e. a 40-ft container is equal to 2 TEU; 45-ft containers are typically also equated to 2 TEU). Expressing throughput in TEUs is useful for evaluating physical storage constraints of a terminal or the train itself (e.g. a double-stack rail car well holds up to 4 TEUs).

The conversion between containers or lifts, and TEUs is unique to the cargo mix at a given terminal. For Port of Virginia terminals, the ratio typically ranges from approximately 1.63 TEUs per container for rail containers to 1.73 TEUs per container for overall terminal throughput (truck and rail traffic).

Train throughput is typically constrained by train length, number of tracks, train volume, and train speed. This is controlled by infrastructure constraints such as the length of passing sidings, the type of signal

systems in place and the geometry of rail curves, the total weight of the cargo, and the ability of locomotive engines to maintain speeds across hilly terrain.

All of these factors must culminate in conditions that result in a total landed cost to the shipper for a desired level of service that is lower than the cost to move the container by truck or barge from another seaport. To establish new rail destinations, a decision that ultimately rests with the railroad, there must also be a confident forecast of sufficient rail demand to establish rail service.

5. NEAR-TERMINAL RAIL SYSTEMS

5.1. Norfolk International Terminals – Sewell's Point Line

Norfolk International Terminals (NIT)

- Largest Port of Virginia container terminal
- On-dock intermodal service via NS
- Industrial rail service provided by NPBL
- CSX access via NPBL
- 280,000 rail containers in 2013
- 39% total throughput is rail

Located in Hampton Roads Harbor on 567 acres along the Elizabeth and Lafayette Rivers, Norfolk International Terminals (NIT) is The Port of Virginia's largest terminal, with a total of six berths dredged to 50', served by 14 Super Post-Panamax / Suez-Class ship-to-shore cranes. The terminal is primarily a container terminal, but also handles break bulk and project cargo for selected ship lines.



Figure 11 – NIT aerial

NIT's rail connection is NS's Sewell's Point Line, which links the terminal to NS's Portlock Yard, from which the Heartland Corridor originates. It also provides rail access to the former Ford plant and other industrial properties in Chesapeake and Norfolk.

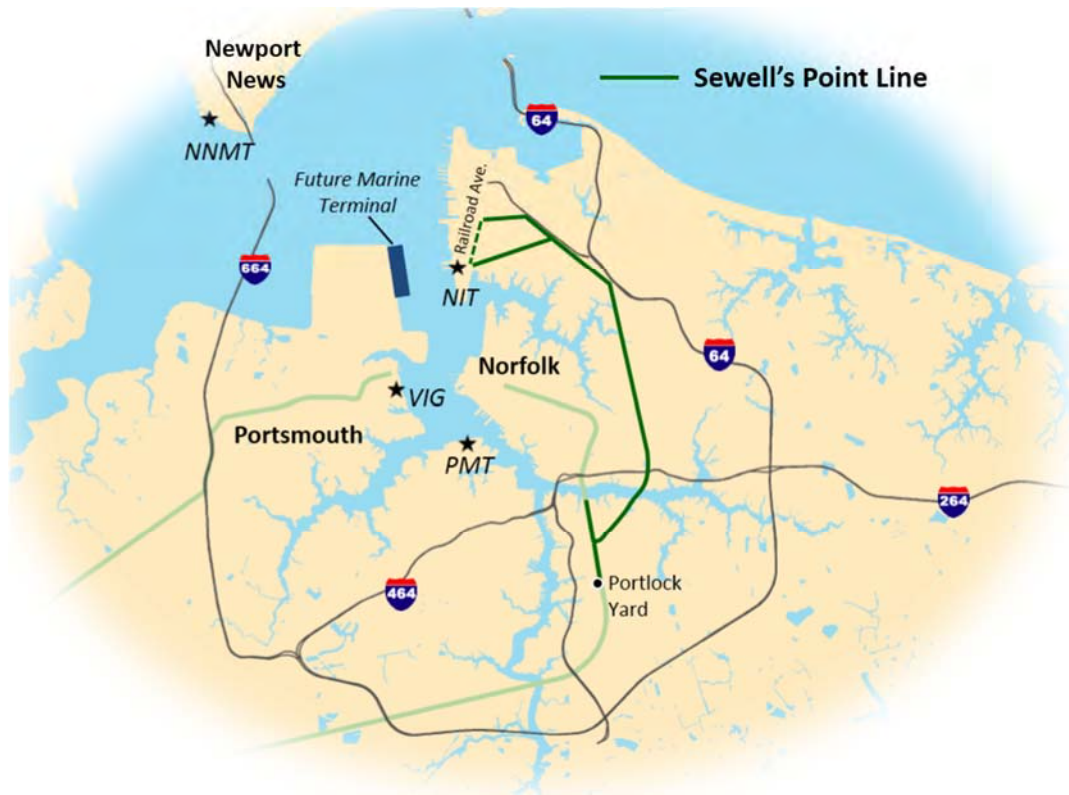


Figure 12 – Sewell's Point Line

5.1.1. Throughput

NS currently has up to four scheduled train arrivals and four scheduled train departures at NIT per day. Additional rail throughput may also be achieved by draying containers to off-terminal intermodal yards operated by NS and CSX. Rail throughput at NIT in 2013 was approximately 280,000 containers, and represented approximately 39% of total terminal throughput. Rail cargo during this period was approximately 59% export and 41% import. Rail throughput has continued to grow.

Sewell's Point Line currently supports an average of 10 to 15 trains per day, with slightly higher traffic closer to Portlock. These are primarily the intermodal trains from NIT, but several other rail-served industries are also located on the line and served by NS and NPBL. Chesapeake & Albemarle Railroad and the Bay Coast Railroad traffic also travel on segments of this corridor.

Additional rail activities, including Lambert's Point coal trains (which may generate up to 50 train movements per day according to FRA's Rail Crossing Inventory) and Norfolk's Amtrak service (approximately 4 train movements per week day), also converge at the Portlock Yard to access the Heartland Corridor. Improvements to Portlock Yard have been recently constructed (partially funded by the State) to help mitigate rail congestion.

Branch of the Elizabeth River is the only major water crossing. Vessel traffic on this segment of the Eastern Branch is fairly light and does not significantly impact use of the bridge. A shorter double track fixed bridge crosses the Lafayette River. The last 1.4-mile segment to NIT's arrival track is single tracked.

The two Port-owned arrival tracks can be used to stage arriving NS intermodal trains until they are ready to be unloaded at the terminal. Though each track is approximately 6,600 L.F. long, the effective storage length is reduced due to at-grade crossings. Each track has two effective storage sections (approximately 3,800 L.F. and 1,400 L.F. for a total of 5,200 L.F. of storage on each track) due to the Diven Street at-grade crossing, which requires an 820 L.F. clear zone when rail cars are stored on the tracks. A second at-grade crossing (Ruthven Street) is located near the east end of the arrival tracks and prevents an additional 580 L.F. on each track from being usable as storage. At the west end, the arrival tracks converge into a single track bisects the intersection of Hampton Boulevard and Terminal Boulevard to connect the arrival tracks to the terminal.

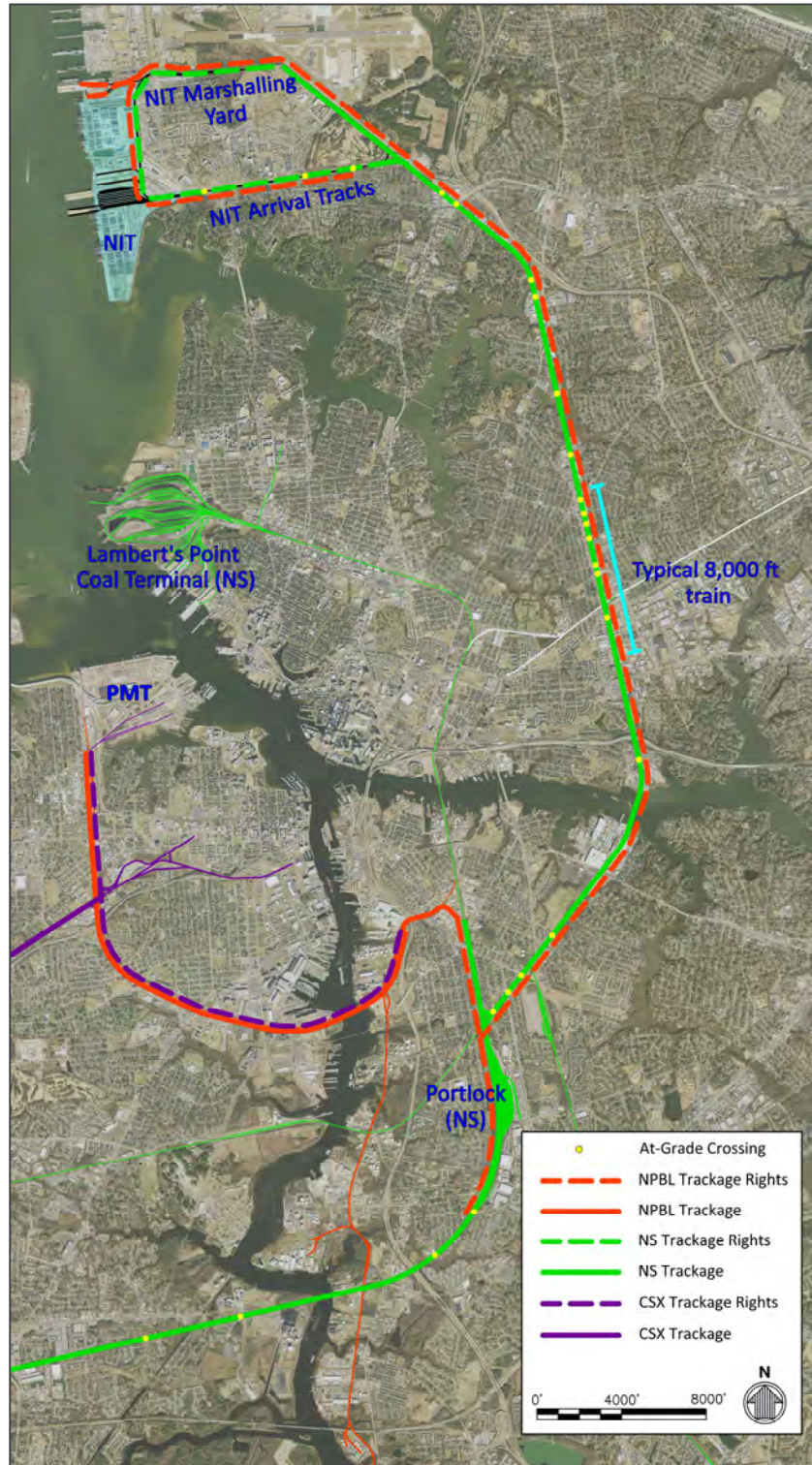


Figure 13 – NIT Overall Rail System

bisects the intersection of Hampton Boulevard and Terminal Boulevard to connect the arrival tracks to the terminal.

NIT's rail system has a loop track configuration that allows rail operations based on rail traffic generally moving through the terminal in one direction. This type of operation is typically easier to manage and supports efficient use of rail infrastructure. Within the terminal, the Central Rail Yard and various storage tracks branch off the loop track along Railroad Avenue. Rail containers are primarily loaded and unloaded within the terminal's Central Rail Yard (CRY). The CRY consists of 12 tracks, each with an effective working length of approximately 1,500 L.F. (~1/4 to 1/5 of a typical intermodal train serving the terminal). Port-owned arrival tracks adjacent to its south gate and a Port-owned marshalling yard adjacent to its north gate further support on-dock rail operations.

The Port-owned marshalling yard provides additional trackage for storing and assembling departing trains. The marshalling yard consists of five tracks, two of which are reserved for NPBL access to Lehigh Cement and Lineage RCS Norfolk, a cold storage facility located on Pier 3. A soon-to-be completed grade separation project at the north will eliminate an at-grade rail crossing on the busy Hampton Boulevard, which also serves Norfolk Naval Station. The east end of the marshalling yard converges onto the Sewell's Point Line which circles back to a junction with the NIT arrival track lead (referred to as Quartermaster Junction).



Figure 14 –NIT On-Dock Rail System

5.1.3. Port-Related Rail Operations

Intermodal rail makes up the vast majority of rail traffic at NIT. The Port coordinates with Norfolk Southern to deliver trains from Portlock. Arriving trains are positioned on the arrival tracks outside of the terminal by Norfolk Southern or directly brought on terminal. Port resources are used to move rail strings between storage and working tracks, as well as the subsequent unloading and loading of containers. The Port currently has a standing agreement with the City of Norfolk to not pull trains across Hampton Boulevard during peak traffic hours.

Within the terminal, the Port relies on U.S. Customs and Border Protection personnel and equipment to screen all import containers prior to being loaded onto a rail car. This majority of this screening occurs while the container is being moved to the train for loading to minimize the number of times the container must be handled on terminal (which in turn minimizes the cost to the Port).

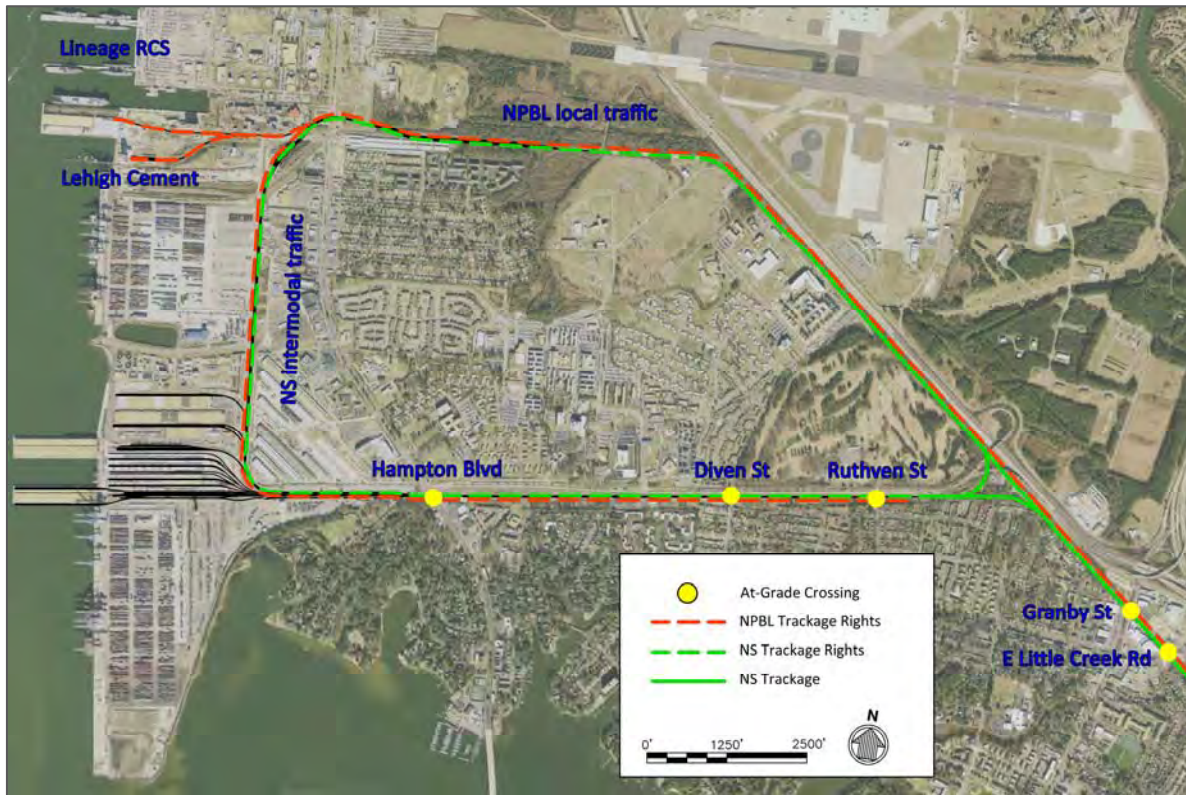


Figure 15 – NIT Rail Operations

Loaded railcar strings are assembled into full length trains along Railroad Avenue on the terminal by the Port, which then coordinates with Norfolk Southern to depart the train out the north tracks to Portlock, where NS may add strings of domestic cargo. Completion of the Hampton Boulevard – Greenbrier grade separation projection will improve connectivity with the Port's adjacent marshalling yard and eliminate the restrictions on blocking Hampton Boulevard traffic.

Trains departing Portlock will pass through Crewe, VA, where NS has a large rail yard. This rail yard is used for combining rail strings from NIT and VIG. A private industry, Lehigh Portland Cement, and a Port tenant, Lineage RCS Norfolk at Pier 3, each operate rail-served facilities adjacent to the North Terminal. Rail access is via a lead off of the north tracks with rail service provided by NPBL. NPBL also uses the north lead to deliver CSX rail to NIT, primarily for project cargo such as large electrical transformers. Project cargo operations typically use the Pier 1 tracks or other on-terminal tracks, excluding the CRY.

5.1.4. Trackage Rights and Access

Norfolk Southern owns the Sewell's Point Line between their Portlock Yard and the NIT marshalling yard, as well as the turnouts onto the NIT arrival tracks. NPBL has trackage rights on the rail line, through the NIT marshalling yard, and into NIT via the north end, where it may operate within the terminal and onto the arrival tracks via the south lead, excluding use of the Quartermaster Junction turnouts onto the NIT arrival tracks, which are typically only used by NS intermodal trains.

NPBL's trackage rights also permit construction of their own rail leads to their customers, including the Port. The 99-year agreement establishing NPBL's trackage rights is set to expire in 2017. Per discussions with NPBL, they anticipate their trackage rights will be retained through a follow-on agreement, however no guarantee or written undertaking has been made.

The NIT marshalling yard was formerly owned by NPBL, purchased by the Port in 2010, and subsequently reconstructed in coordination with the Hampton Boulevard Grade Separation project. As part of the purchase agreement, NPBL retains trackage rights through the marshalling yard to its customers. This agreement provides for a dedicated thru track and a runaround track, which NPBL uses to push rail cars onto the facilities after pulling them from their Berkley Yard.

CSX has access to NIT via NPBL by interchanging at NPBL's Berkley Yard, who charges a flat per-car rate for delivery to the terminal. This arrangement introduces additional operations and costs for CSX traffic which would need to be mitigated in order to establish competitive intermodal rail access to NIT (see Table 6). Regularly scheduled operations would need to be further integrated into the existing train schedules and may introduce service issues that would necessitate additional trackage for staging and train movements. CSX has existing service to NIT via NPBL for low volume rail service such as project, break bulk, and bulk cargo.

NS did not identify any immediate concerns with capacity on the Sewell's Point Line, though acknowledged it could be an issue in the future. A higher share of imported containers likely would require additional CBP resources.

Table 7 – Summary of Dual Rail Access Operations at NIT

NIT DUAL RAIL ACCESS OPERATIONS	
Norfolk Southern	CSX
Portlock Yard provides nearby staging for NS intermodal trains to/from NIT	Must interchange with NPBL at Berkley Yard
Direct access to terminal	Rail configuration at the north end of Portlock constrains direct NPBL traffic flow between Berkley Yard and Sewell's Point Line; typically requires entry into Portlock Yard and shifting locomotive to opposite end of train.
	NPBL traffic subject to NS prioritization on Sewell's Point Line (as well as BCR and CA traffic); very limited passing capacity available.
	NPBL access into NIT is counter to the Port's on-terminal intermodal traffic flow.

5.1.5. Competitive Enhancements

The following improvement concepts were considered as part of the development of the Master Rail Plan to improve The Port of Virginia's competitive position among other ports:

- Fostering competitive dual rail service
- Improving existing rail access and operations
- Improving community tolerance of Port activities
- Continued effort to maximize utilization of existing rail resources

The intent of these improvement concepts is to support further discussion among the Port, stakeholders and the railroads, as implementation of such improvements will require close coordination among stakeholders, and, in the case of trackage improvements, approval by the owning entity.

5.1.5.1. NIT Concept 1 - Independent Railroad Access

Competitive on-dock dual rail access (i.e. direct rail access by two Class I railroads that would support the Port's competitive position against other East Coast ports) at NIT through the construction of dedicated trackage from NIT to CSX rail lines would minimize impacts to the existing rail service. However, this rail

line would need to be constructed through the urbanized heart of Hampton Roads, with multiple road and water crossings, including a major water crossing over the heavily trafficked Elizabeth River. No specific alignments were explored as part of this effort.

NIT would likewise require substantial infrastructure improvements to accommodate and operationally support independent rail access. This project would be a major undertaking with significant impacts to the Norfolk, Chesapeake, and Portsmouth communities, and would need to be justified by an equally substantial benefit to the Port. Given the magnitude of rail throughput already supported by NIT, it is uncertain that the incremental benefits of pursuing this concept would be sufficient to justify the cost.

5.1.5.2. NIT Concept 2 - Rail Traffic Flow Improvements

Improvements to NPBL and Sewell's Point Line systems may lessen the operational costs associated with intermodal service:

- Establish an unconstrained direct connection between NPBL and Sewell's Point Line to allow NPBL to move directly onto the track without first pulling into Portlock and shifting the locomotive.
- Construct a unit train length siding to support improved staging of additional intermodal trains near NIT.
- Double tracking Sewell's Point Line, including the Eastern Branch Bridge, to improve the fluid movement of all rail traffic (NS, NPBL, CA, and BCR).

An additional benefit that some or all of the above improvements would provide is to reduce the impact of increased rail traffic generated by NIT to the rail service of local industries.

Implementation of such improvements would require close coordination and ultimate approval from the owning railroads. The Port would also be a key stakeholder and would need to carefully evaluate the net effect of such service on its overall competitive position, particularly if there would be any anticipated adverse impacts to existing levels of service.

The costs of these improvements would need to be weighed against their overall benefits.

5.1.5.3. NIT Concept 3 - Drayage

Off-dock solutions are another approach to expanding rail access. Such solutions could consider an expanded over-the-road drayage program or a cross harbor barge service to access CSX intermodal facilities.

The major challenge to implementing these solutions is making them financially sustainable, either as standalone operations (very difficult) or as part of a broader approach that seeks overall sustainability in exchange for subsidizing selective elements (more feasible, but still difficult at a large scale). Expansion or improvements to CSX's intermodal facilities may also assist with these efforts. Absent financial sustainability and substantial volume, it is unlikely this approach could exert significant competitive pressures.

5.1.5.4. NIT Concept 4 - Long Term Capacity Growth

Expansion of other Port rail capacity – VIG’s expansion and eventual construction of a future marine terminal on Craney Island with competitive dual rail access – further augments the Port’s ability to strategically align ship lines with the terminals that best suit their needs (in consideration of multiple complex factors, of which rail service is only one element).

5.1.5.5. NIT Concept 5 – Crossing Safety/Separation Improvements

A substantial amount of the rail infrastructure supporting NIT is owned and operated by the Port providing the opportunity for the Port to optimize its operations through internal projects. NS investments in the Sewell’s Point Line have likewise been focused on supporting intermodal rail traffic to NIT, as it is the predominant rail activity on the line.

As rail traffic increases (and in consideration of any Port decision to expand rail capacity at NIT), the Port, as a state agency, may have pressure placed upon it by impacted residents and industries to restrict rail operations (such as the existing limits to Hampton Boulevard crossings). Early efforts to mitigate these impacts will support the Port’s focus on efficiency of its rail operations. Of particular concern are:

- The City of Norfolk, which maintains 12 at-grade crossings along the Sewell’s Point Line. There are also three at-grade crossings along the arrival tracks into NIT, including Hampton Blvd. Two private industries are also accessed by at-grade crossings.
- The City of Chesapeake, which maintains four at-grade crossings along the Sewell’s Point Line.
- The City of Suffolk, through which rail traffic generated by Southside Hampton Roads converges and where there are numerous at-grade crossings.

Safety improvements to highway crossings, including improved warning systems, construction of grade-separated crossings, and/or crossing closures will help mitigate the impacts of more frequent and/or longer crossing blockages due to passing trains (along with other benefits such as improved safety and quality of life).

Planning of these efforts, if coordinated with the railroads and Ports, may also provide the opportunity to improve the efficiency of rail operations by strategic placement of staging sites for longer trains and elimination of the need to split trains into smaller sections (such as in the case of the arrival tracks at NIT).

Local transportation project funding priorities are, in part, generated by planning tools such as HRTPO’s Project Prioritization Tool based on quantified benefits and costs. Robust traffic data and projections to define roadway projects are readily available or easily collected, and modelling resources are readily available to support follow-on analysis.

Rail traffic data is available through the Federal Railroad Administration, but current tools to use this data to assess crossing projects may not accurately quantify the costs and benefits relating to traffic flow impacts (existing tools such as GradeDec are focused on safety issues). This introduces challenges to cities seeking to define projects sufficiently enough to be evaluated in the prioritization process.

In the face of limited funding and staff resources, municipalities may currently avoid investigating such projects in favor of projects that generate more immediate and better understood benefits, resulting in an underrepresentation of rail safety and community mitigation projects. Localities may further have difficulty generating public support for projects that, in the opinion of the locality's citizens, should not be the locality's sole responsibility to fund.

5.1.5.6. NIT Concept 6 - U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) personnel work very closely with Port operations to provide the level of support necessary to maintain the stream of commerce through the terminal.

Despite the local CBP efforts, these resources are not always sufficient to provide the coverage the Port may require at NIT. As rail demand increases, additional U.S. Customs and Border Protection resources may be necessary to support rail operations.

Infrastructure and technology improvements can reduce the manpower resources required to meet the federal screening requirements. During initial inception of the screening program, these improvements were substantially funded by the Department of Homeland Security (DHS), but as the program has matured and budgets have become more constrained, funding of these improvements has shifted to the Port.

Requests for increased CBP manpower require justification that may be difficult to establish, particularly in the early stages of growth when the needs are not continuous.

5.1.6. Recommendations to Improve Rail Competitiveness at NIT

Of the concepts identified above, the following are immediately recommended to support improved rail competitiveness at NIT. It is recommended the remaining concepts be coordinated between the Port and railroads if needed to support the Port's strategic growth strategies.

Strategic Port Growth: Expansion of capacity at VIG and the construction of the future marine terminal on Craney Island will augment the Port's ability to strategically align ship lines with the terminals best suited to meet their needs need while growing overall Port capacity to meet growing demand.

Rail Crossing Improvement Program: Increased rail impacts to the local communities can adversely affect Port competitiveness if such impacts lead to operational restrictions or reduced public support for projects that benefit the Port. Responsibility for infrastructure alternatives to operational restrictions generally rests with the localities. These communities have moderate to severe fiscal stress.

The Commonwealth should establish a program that provides the technical and funding resources to specifically assist communities with planning and/or construction of grade separated crossings and other crossing safety improvements, specifically:

- Update/establish the methodology and supporting resources to improve the ability of localities to more easily and accurately define the need for rail crossing safety and congestion projects.

- Establish a program to provide financial assistance and/or training to communities to evaluate crossing projects using the above guidance and tools that does not impact locality's current transportation funding.
- Consider appropriating a separate funding source to provide funding support to a selected number of the highest priority rail crossing projects, as identified by the above evaluation.

An example of a targeted funding program is California's Proposition 1B Grade Separation Program, which dedicated \$250 million to grade separations and leveraged an additional \$750 million in local and private funds for grade separation projects. California has a separate grade crossing Section 190 safety program.

Another example includes North Carolina's "Sealed Corridor Project," which focused on eliminating or improving crossings along its heavy rail corridors to the benefit of both freight and passenger rail (as well as vehicle traffic). The state also has ongoing efforts to update criteria for evaluating benefits and costs to prioritize grade separation projects, including differentiation between rural and urban candidate sites.

This program should be administered by an entity with the resources necessary to integrate the transportation mobility, safety, and freight network elements that would be critical to appropriately prioritizing candidate projects.

U.S. Customs and Border Protection Resources

As demand increases, the Port may need additional U.S. Customs and Border Protection resources to maintain the level of service to its customers. Currently, the Port works with the local Field Office to formalize and justify requests for these resources as they are needed.

In the event that U.S. Customs and Border Protection is unable to allocate funding to support the requested increases, Section 560 of the Consolidated Appropriations Act, 2014 has authorized U.S. Customs and Border Protection to accept "donations of real property, personal property (including monetary donations) and non-personal services" from private sector and government entities.

If CBP is unable to get necessary additional resources, state support, through the above described "donation" process, may need to be considered as a possible, but not a definite, mechanism to provide the necessary CBP resources. This support would need to be evaluated against potential adverse competitive impacts.

5.2. Portsmouth Marine Terminal

Portsmouth Marine Terminal (PMT)

- Port of Virginia container/mixed-use terminal reopened in September 2014
- CSX and NS (via NPBL) access
- CSX intermodal yard adjacent to terminal
- NPBL rail yard located to the south of the terminal
- Rail activity is currently limited to project cargo but may be expanded to support future rail-served industrial development

Portsmouth Marine Terminal (PMT) occupies approximately 285 acres on the west bank of the Elizabeth River. PMT operated as a container terminal until VPA began leasing APM Terminals Virginia (now the Virginia International Gateway) in 2010. Existing PMT customers were transferred to VIG to take advantage of the more modern and efficient terminal, and major terminal operations at PMT ceased in early 2011. In September 2014, PMT was reactivated for container and project cargo operations, with portions of the terminal remaining available for development of tenant industries. The terminal has 4,530 feet of wharf with a nominal 43-foot berth depth.



Figure 16 – PMT aerial

5.2.1. Throughput

Capacity to provide additional rail service to PMT will be highly dependent on the nature of the individual rail operations established at PMT.

The single track rail between CSX's main line to PMT establishes a significant chokepoint, as this line is used by CSX to access its intermodal facility, and would potentially be used by both NPBL and CSX to access PMT. The potential development of NPBL customers along the rail lead would also impact rail capacity at PMT.

While NPBL and CSX provide services over the same trackage, it is inevitable that delays will develop due to normal switching operations carried out along the line by both carriers. For industrial activities with sensitive rail schedules, this inherent conflict effectively reduces capacity as the industry must allocate more time to each train to account for the uncertainties of the rail schedule. These delays could potentially affect CSX customers on NPBL.

5.2.2. Rail System Infrastructure

A single track segment of NPBL's rail network links PMT to CSX and NS (via NPBL) rail systems. Off of this single track, CSX operates an intermodal yard adjacent to the terminal to the south, through which a second lead into PMT on the east end once existed. An NPBL rail yard is located to the south of the terminal as well.

Historically, the internal rail system connected the two leads accessing the terminal. Most of this rail, including the east lead, was abandoned in place or locally demolished to support other terminal activities.

The alignments of the rail leads into the terminal are constrained at both ends. The east lead is constrained by elements of the Midtown Tunnel, including the crossing location and the vent buildings. Construction of the second Midtown Tunnel is underway until 2017, which may further constrain rail concepts desired in the near term. The west lead is constrained horizontally and vertically by the Pinner's Point highway interchange system, which was constructed over the rail lead.

5.2.3. Port-Related Rail Operations

The Port currently does not provide on-dock intermodal rail service at PMT; rail containers are drayed by truck to or from other facilities that provide this service. Project cargo rail operations have resumed with the re-opening of the terminal on an as-needed basis.

5.2.4. Trackage Rights and Access

Dual rail access to the PMT is provided in two forms and provides a competitive offering for The Port:

- NPBL is owned by and has access to both CSX and NS
- CSX and NPBL both have direct access to the terminal

The single track to the terminal and CSX's intermodal yard is owned by NPBL, with CSX having trackage rights. This provides NS with access to the terminal via interchange with NPBL. Rail traffic on this segment is managed by NPBL.

South of the terminal, CSX owns a turnout and intermodal yard, out of which the former east rail lead extended into PMT (and which can be restored by the Port if necessary to support rail operations). NPBL does not have trackage rights into CSX's intermodal yard.

CSX can directly access the terminal via the west lead and the east lead. CSX is also presently leasing the NPBL yard south of the terminal to support its intermodal yard operations.

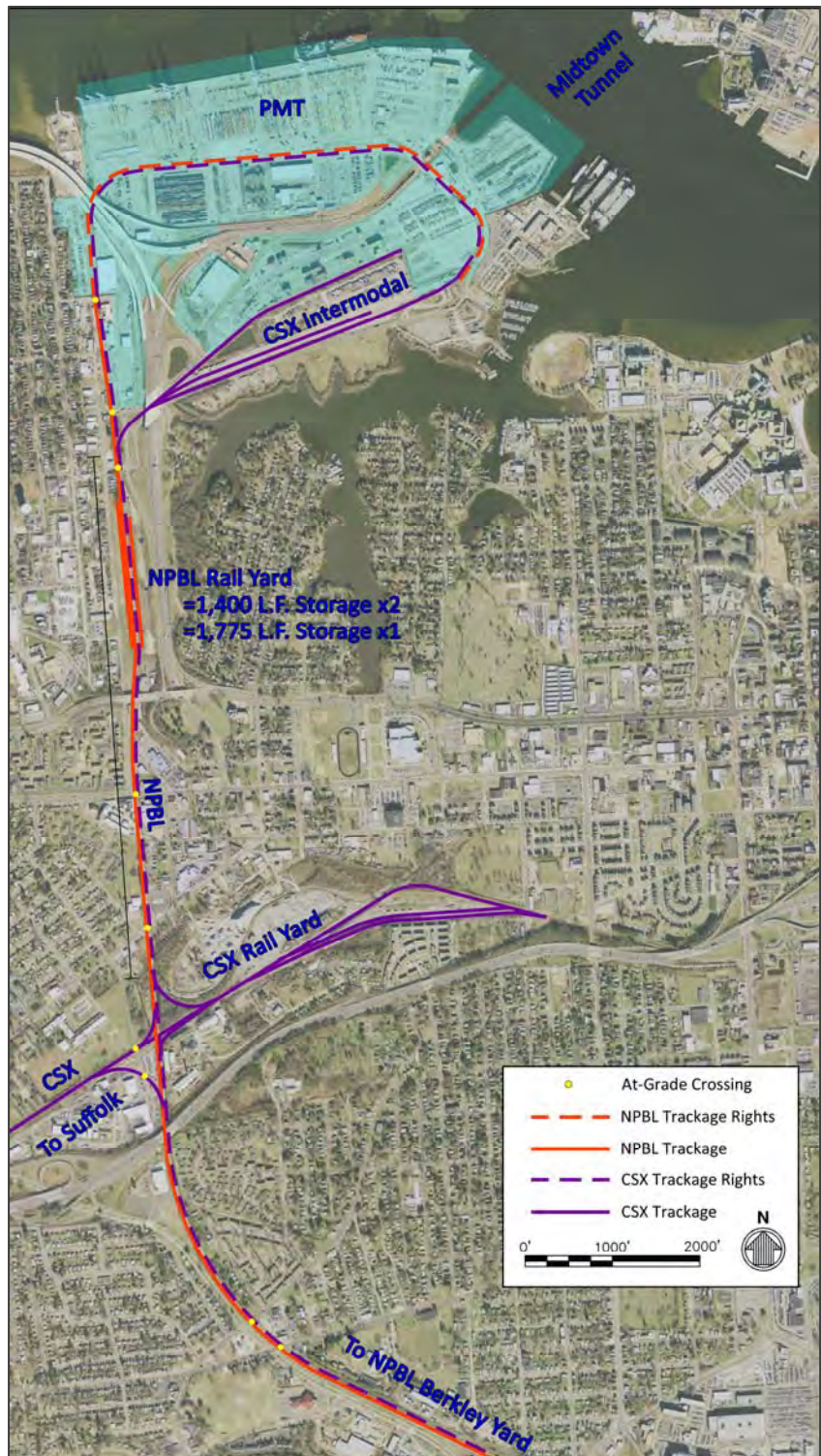


Figure 17 – PMT Overall Rail System

Table 8 – Summary of Dual Rail Access Operations at PMT

PMT Dual Rail Access Operations	
Norfolk Southern	CSX
Must interchange with NPBL at Portlock	Can stage traffic at Kilby or local rail yard.
Access to PMT (thru NPBL) via west lead only	Direct access to PMT via trackage rights on NPBL's line (and subsequent access to both east and west leads)
	CSX traffic subject to NPBL traffic prioritization on NPBL's system.

5.2.5. Competitive Enhancements

5.2.5.1. PMT Concept 1 – Enhancing Private Industry Development Potential

The Port envisions PMT as a mixed-use terminal, supporting container operations and private industry tenants, some of whom may require rail service. The opportunity for dual rail access is an attractive feature of the terminal, but the value of that feature is highly sensitive to the:

- Rail needs of the industries
- Number of rail-served industries on terminal
- Configuration of rail infrastructure serving those industries
- Approach through which the Port chooses to manage on-terminal rail service
- Level of rail activity at private industries in the vicinity of, but outside the terminal

The constraints to rail infrastructure at PMT may require trade-offs between operational efficiency and access by both railroads, resulting in the following dynamic:

- Where tenants focus on optimizing their operations, they may have to design for the operations of one railroad. This may adversely impact the ability for the other railroad to efficiently serve that same tenant or other terminal tenants.
- Where tenants focus on maintaining the opportunity for rail service by both railroads, the operational efficiency and/or quality of service of that same tenant or other terminal tenants may be adversely impacted.

How dual rail access will be used as a competitive benefit in this setting must be evaluated by the Port and may require making decisions that are detrimental to dual rail access, but improve overall Port operations and profitability.

Complicating industrial development further is that the value of a port facility is derived from its ability to maximize the transfer of cargo between ship and shore. It is therefore in the Port's interest to minimize the footprint of facilities that do not directly contribute to this activity. As terminal space is also a scarce resource, it may be infeasible to fully accommodate a prospective industry's needs fully within the terminal. In these cases, offsite facility development must be coordinated.

5.2.5.2. PMT Concept 2 - Improvements to Support Concurrent Rail Activities

Rail access to the available development areas within the terminal are constrained by the Pinner's Point highway interchange structures on the west, and tunnel construction on east (thru 2017), where currently only single tracks can be accommodated. These two sections have frequently been identified as critical segments to support multiple tenant rail operations and thus are a possible constraint to accommodating two railroads.

Preliminary concepts to improve access on the west side and circumvent the physical constraints of the Pinner's Point highway interchange require acquisition of off-terminal properties to accommodate a second on-terminal lead. This access could be further improved by construction of a second track on NPBL's system.

Upon conclusion of tunnel construction, it is likely that the Port and railroads will be able to identify solutions to mitigate the constraints on the east lead to improve on-terminal rail traffic flow by both railroads.

The need for any of these improvements are dictated by the specific operations of the industries and would be more thoroughly identified as part of a coordinated industrial development effort (see below). Improvements on railroad-owned right-of-way would require approval by the owning railroad.

5.2.5.3. PMT Concept 3 - Crossing Safety/Separation Improvements

The 2005 City of Portsmouth Comprehensive Plan, Destination 2025, identifies as a key issue the need to minimize the impacts of rail traffic generated by waterfront industrial uses on Portsmouth's local streets and neighborhoods (with specific attention being given to the then-proposed VIG terminal and future marine terminal on Craney Island). In proximity to PMT and NPBL's system, the following projects are active:

- A project to widen Turnpike Rd along the segment that includes the at-grade crossing over NPBL's track is currently on VDOT's Six Year Improvement Program (SYIP), but does not include construction of a grade separation.
- The Martin Luther King Extension is a component of the Midtown and Downtown Tunnel projects and would improve access between I-264 (Downtown Tunnel) and State Route 58 (Midtown Tunnel). This project may divert some traffic away from existing at-grade crossings and is part of VDOT's SYIP.

No other projects involving the NPBL line have been identified on long range transportation plans. However, additional local rail-served industries could impact traffic, mobility, and the community, and may warrant mitigation projects.

If unit train rail service to PMT is sought, mitigating improvements such as grade separation projects outside the terminal will need to be explored to reduce impacts to the adjacent neighborhoods and overall traffic mobility, particularly if arrival and/or departure switching activities are going to occur off-terminal.

5.2.6. Recommendations to Improve Rail Competitiveness at PMT

Terminal Master Plan: Industrial development at PMT should be bolstered by a coordinated effort among the Commonwealth, the Port, municipalities, and railroads working towards a common vision of what type of industrial activity is desired. A recommended framework for this is as follows:

- The Port, with assistance and input from the Virginia Economic Development Partnership (VEDP), should identify the type of Port activities that generate the most benefit to Commonwealth.
- The Port should coordinate with the railroads to develop a master plan (or plans) for the terminal that accommodates those specific activities, including identification of any off-terminal needs.
- A lead entity, such as VEDP, should be designated to coordinate planning efforts by the municipalities and railroads to develop a master plan for identified off-terminal needs.

These efforts result in a concept that VEDP, Port, and other economic development agencies can market to the industries they seek to attract.

Rail Crossing Improvement Program: Consistent with the NIT-related recommendation, increased rail impacts to the local communities can adversely affect Port competitiveness if such impacts lead to operational restrictions or reduced public support for projects that benefit the Port. The Rail Crossing Improvement Program to mitigate rail impacts, as described in Sections 5.1.5/5.1.6, is recommended.

5.3. Newport News Marine Terminal – CSX Peninsula Subdivision

Newport News Marine Terminal (NNMT)

- General cargo and roll-on/roll-off terminal
- Rail activity is tenant break bulk and occasional project cargo
- Direct CSX access
- CSX line to Richmond, where there is opportunity to interchange with NS

Newport News Marine Terminal (NNMT) is The Port of Virginia's primary break bulk and roll-on/roll-off facility. The terminal occupies approximately 165 acres on the north bank of the James River. The facility has two piers with four vessel berths.

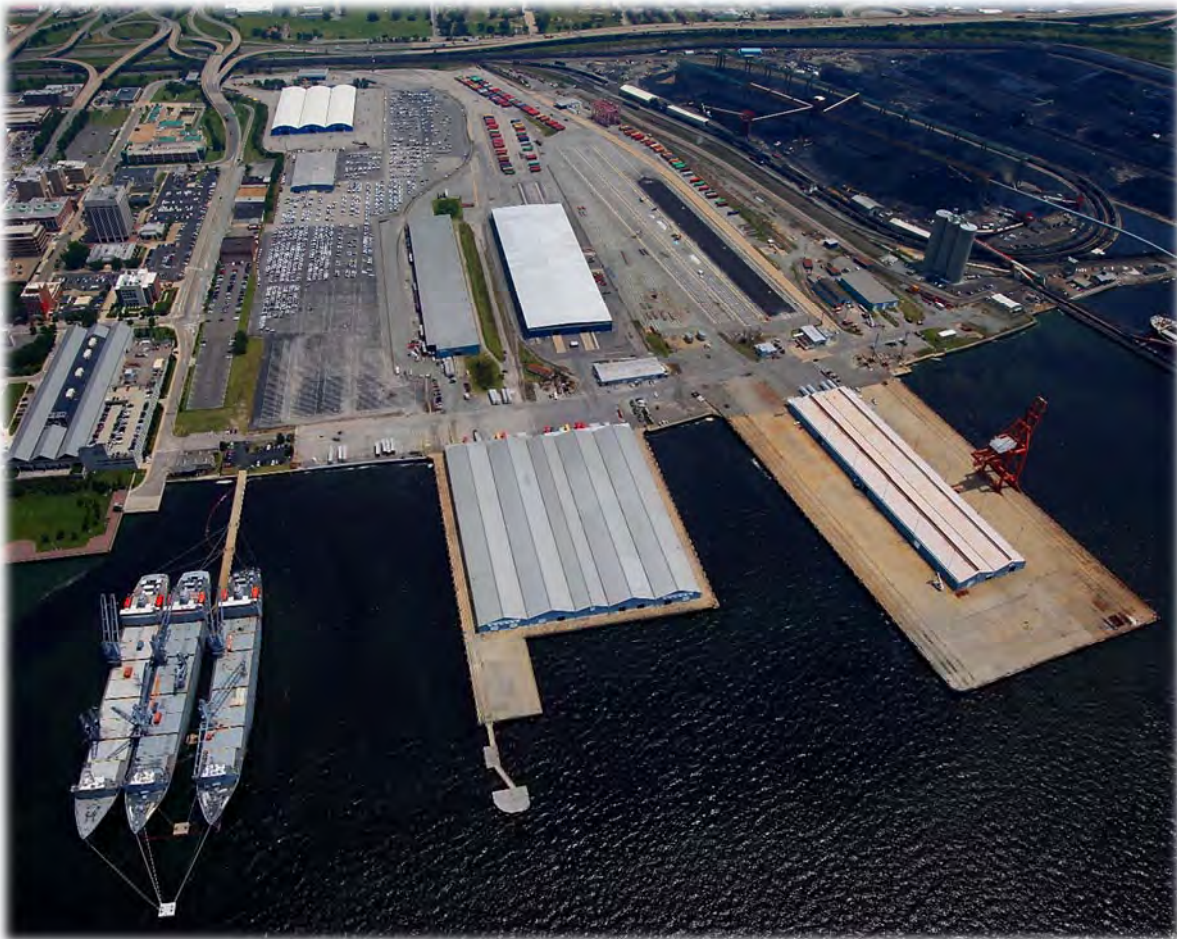


Figure 18 – NNMT aerial

In 2009, the Port consolidated various general cargo handling operations at NNMT, where it maintains several warehouses and a storage area for automobile imports.

5.3.1. Rail System Infrastructure

NNMT's on-terminal rail infrastructure consists of several dead-end rail spurs that access the terminal through two rail gates off of CSX's Peninsula Subdivision trackage that serves the adjacent coal terminals.

The Peninsula subdivision rail corridor runs between the Newport News coal terminals (adjacent to NNMT) and the CSX Fulton Yard in Richmond, approximately 70 rail miles away. The corridor is configured for fluid movement of trains with several passing sidings and nearly all urban road crossings being grade-separated.

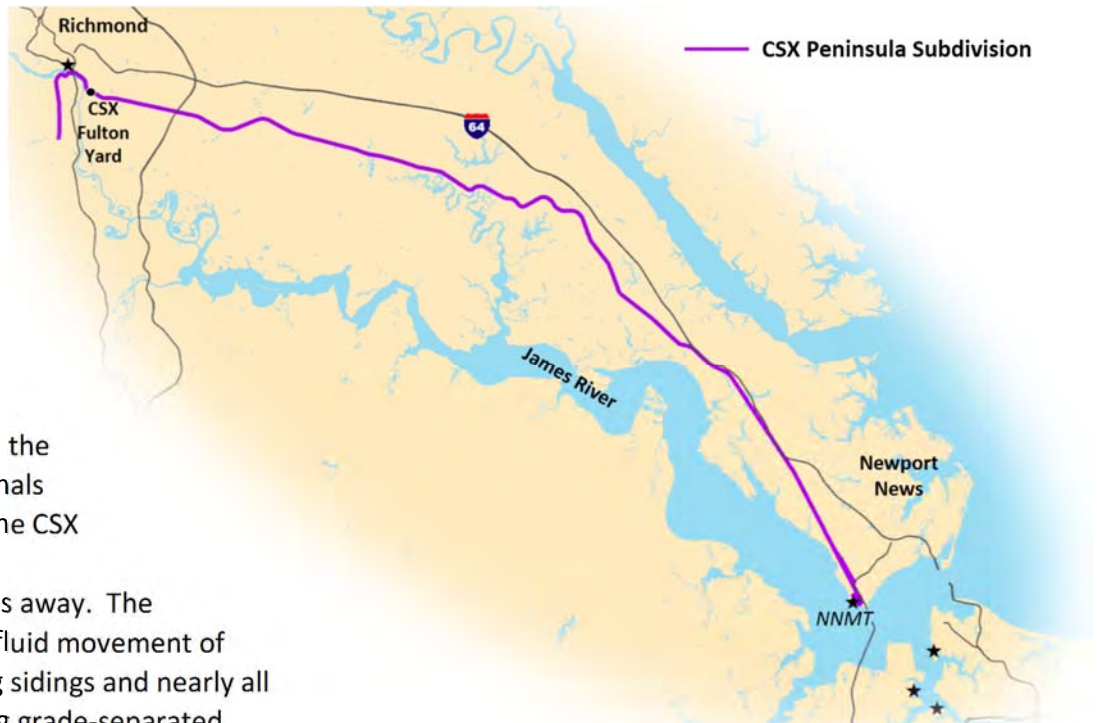


Figure 19 – CSX Peninsula Subdivision

5.3.2. Port-Related Rail Operations

Rail service is coordinated by the Port with CSX and typically consists of tenant break bulk operations approximately three times per week and project cargo on an as-needed basis.

5.3.3. Trackage Rights and Access

The terminal is directly connected to the CSX rail system and can connect to the NS system through switching operations available in Richmond.

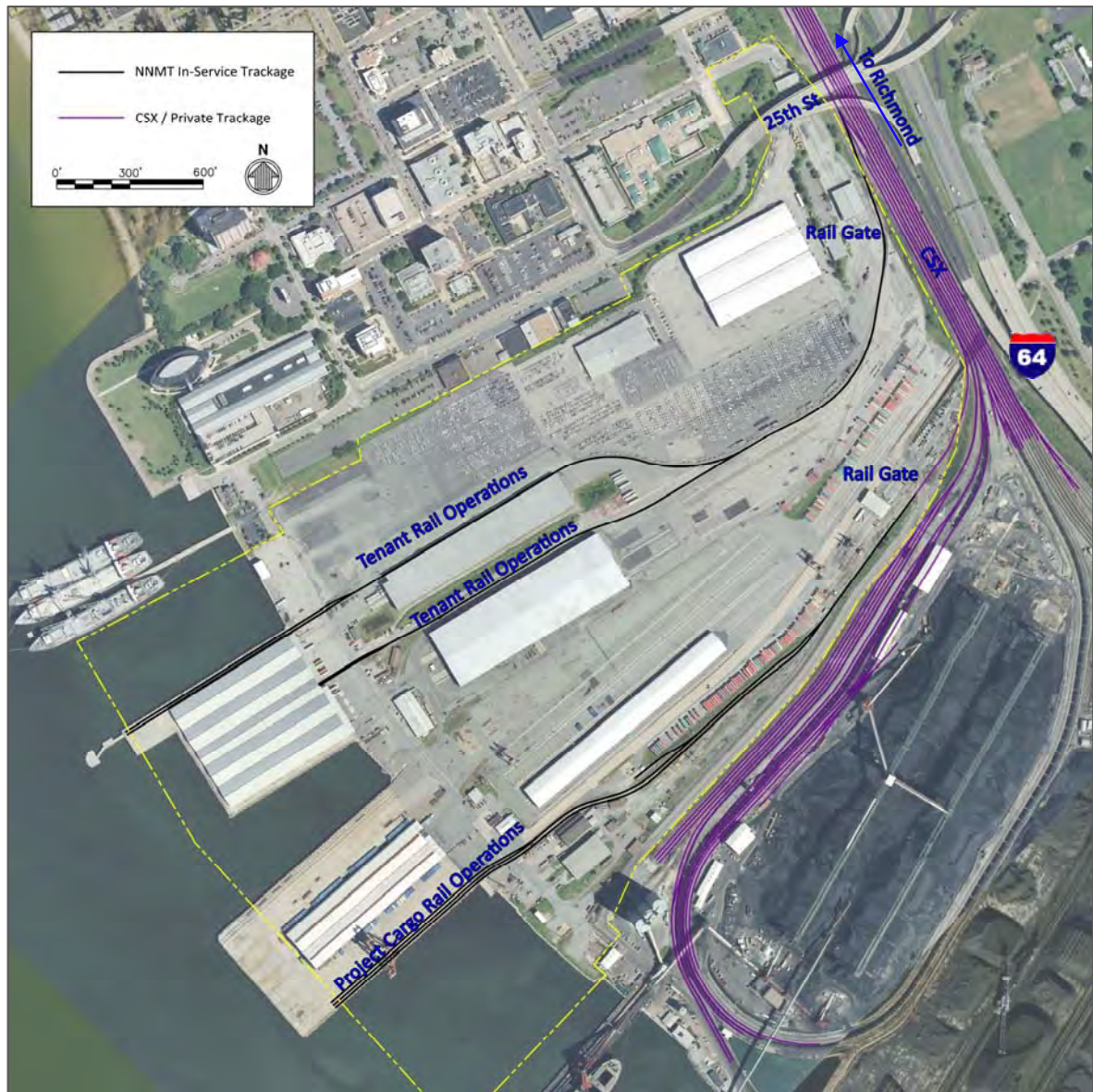


Figure 20 – NNMT Overall Rail System

5.3.4. Competitive Enhancements

There are no competing rail assets in the vicinity of Newport News Marine Terminal to support competitive dual rail access to the terminal.

On terminal, the Port may consider rail improvements to meet the needs of its industrial tenants or Port operations. CSX has indicated their rail corridor (Peninsula Subdivision) has capacity to potentially support increased rail activity at the terminal. There are vertical clearance restrictions west of Fulton Yard that would need to be evaluated if cargo opportunities required taller rail cars. CSX has indicated that

clearance improvements have been identified to relax the clearance restrictions and can be initiated when justified.

5.3.5. Recommendations to Improve Rail Competitiveness at NNMT

Improvements to relax the clearance restrictions may support attracting additional automobile cargo through NNMT that is otherwise diverted due to these restrictions. Since automobile contracts are frequently re-bid, there may be little willingness to otherwise entertain an opportunity that requires capital improvements unless such improvements are executed preemptively. Clearance improvements may also improve the attractiveness for other cargo types that likewise would not consider locations requiring off-terminal capital improvements.

The Master Rail Plan does not recommend any improvements otherwise designed to foster rail competitiveness and expand rail capacity. Other off-terminal improvement needs are not anticipated based on the Port's current utilization of NNMT. The CSX rail corridor is highly segregated from surface traffic through numerous grade-separated crossings and elimination of almost all at-grade crossings. Coal traffic to the adjacent coal terminals is the dominant rail traffic; minor increases to port rail traffic is unlikely to generate new concerns from either CSX or the community.

As cargo commodity markets change, there have been public and private entities interested in major rail infrastructure improvements to serve import and export markets through The Port of Virginia and/or other east coast ports. Such improvements, if ever implemented, will warrant a reassessment of cargo operations at NNMT.

5.4. Virginia International Gateway – Commonwealth Railway

Virginia International Gateway (VIG)

- Port of Virginia semi-automated container terminal
- On-dock intermodal service by CSX and NS access via CWRV
- Terminal Master Plan supports expansion of rail capacity
- Over 150,000 rail containers in 2013

Virginia International Gateway (VIG), formerly APM Terminals Virginia, is a marine container terminal located along the Elizabeth River in Portsmouth. The facility was commissioned in September 2007, leased to the Virginia Port Authority in 2010, and subsequently sold to Alinda Capital Partners and Universities Superannuation Scheme, Ltd in 2014.

The terminal is designed to service super post-Panamax class vessels, and is accessible by a 50-foot navigation channel, the interstate highway system, and both Class I railroads (CSX and NS) via the Commonwealth Railway. The terminal is constructed as a semi-automated operation, with a mix of manual and automated container handling equipment. Its design is unique in that many of the terminal's operations are performed remotely from a centralized terminal operations center.



Figure 21 – VIG aerial

The container wharf has a total of three berths, and the terminal is equipped with a fleet of eight super post-Panamax class ship-to-shore cranes capable of handling the largest container vessels. The backlands consist of an approximately 65-acre semi-automated rail-mounted gantry (RMG) stacked container storage yard plus additional storage area for stacked empty containers, wheeled refrigerated containers, wheeled intermodal staging, chassis storage, and wheeled oversized loads. Rail service is via an on-terminal intermodal yard.



Figure 22 – VIG On-Dock Rail System

5.4.1. Throughput

NS and CSX each typically have one scheduled arrival and one scheduled departure per day via CWRY. Rail throughput in 2013 was approximately 150,000 containers and has continued to grow. The VIG terminal has planned expansion areas within the terminal to increase its capacity if/when the capacity is necessary to support the Port's commercial strategies.

During a study of VIG's intermodal yard operations in 2012, total train-feet handled at the terminal was approximately 60% CSX / 40% NS, suggesting a viable competitive environment exists in that both railroads are able to get similar quantities/lengths of trains to the terminal. Utilization of those trains for container throughput, however, is subject to a number of factors, including system-wide stack height,

import/export balance, and availability of resources. The Port has limited or no ability to control or influence many of these factors.

5.4.2. Rail System Infrastructure

Rail service to VIG is provided by Commonwealth Railway (CWRV), which owns (some segments are under long-term lease from the State) and operates a rail corridor between the terminal and the main lines of CSX and NS.

The CWRV corridor is approximately 19-miles between the terminal and the main lines of CSX and NS. Approximately 5 miles of the corridor was relocated to the median of S.R. 164 and I-664 to eliminate several at-grade crossings, with 3.8 miles immediately outside VIG subsequently double tracked before transitioning to a single track to a marshalling yard in Suffolk, approximately 10 miles from the terminal, with two 8,000 foot sidings.



Figure 23 – Commonwealth Railway

There is sufficient right-of-way at the Suffolk Marshalling Yard to construct two additional 8,000 foot sidings, though doing so will necessitate relocating two large raw water pipelines owned by the City of Norfolk and the City of Portsmouth. A Department of Rail and Public Transportation Rail Enhancement Fund Grant has been awarded to CWRV to partially fund the track construction, but does not include any funding for the pipeline relocations. The terms and conditions cost of any such relocations have not been fully evaluated.

The segment between the marshalling yard and the CSX and NS main lines is likewise single track. The interchange between CWRV and CSX and NS is located near downtown Suffolk.

A future alignment concept extends the CWRV corridor to provide rail service to the future marine terminal planned on Craney Island.

The existing terminal tracks are accessed via a single track lead which branches into an intermodal yard with six working tracks each with an effective working length of approximately 2,350 feet (approximately 1/3 to 1/4 of a typical intermodal train serving the terminal). A second lead is in place for a planned expansion of the terminal's intermodal yard, but currently terminates outside the terminal. There is available space within the terminal to accommodate additional trackage and other container operations.

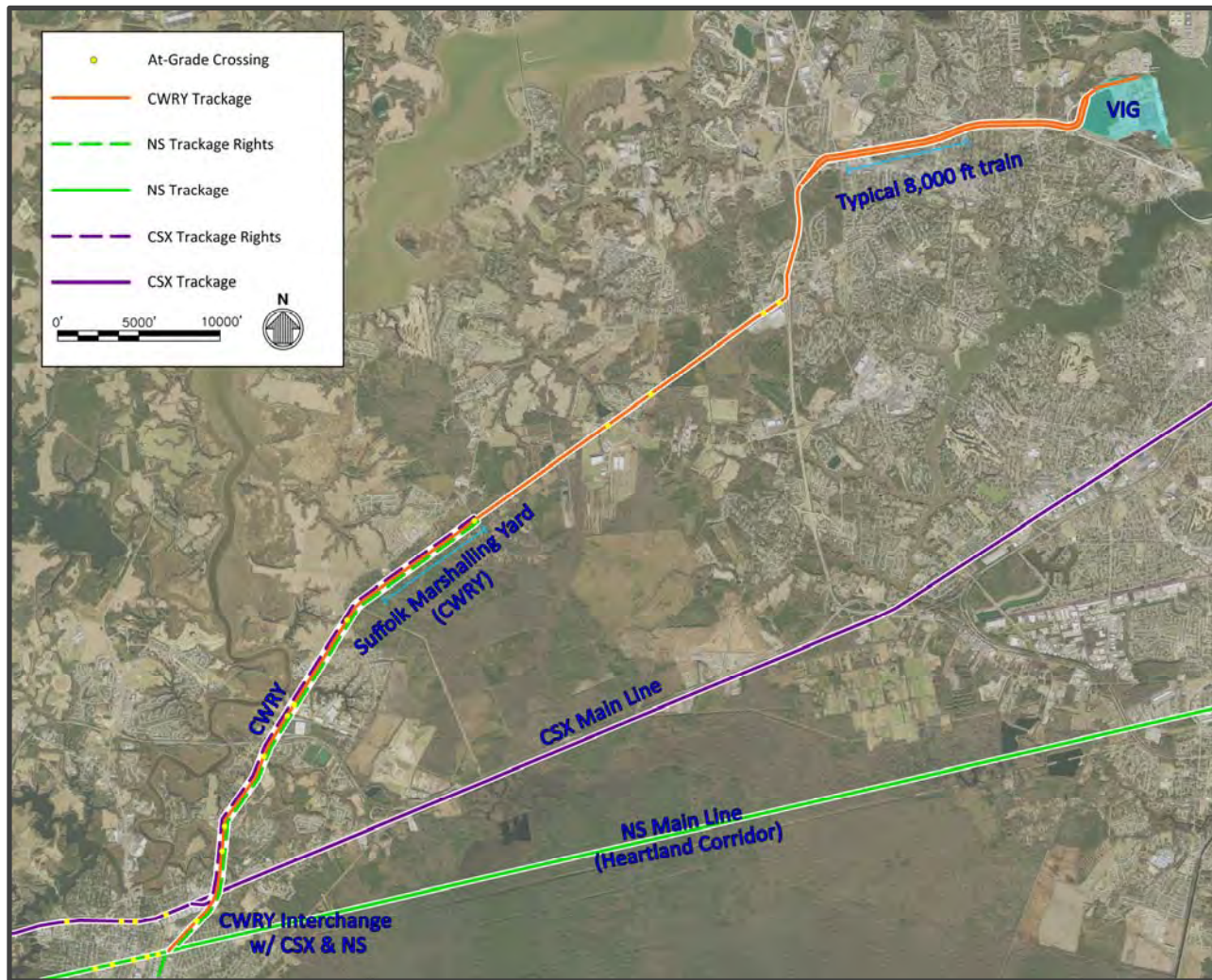


Figure 24 – VIG Overall Rail System

5.4.3. Port-Related Rail Operations

Rail traffic at VIG is almost exclusively intermodal traffic.

Commonwealth Railway is a Class III short line railroad owned by Genesee & Wyoming, Inc. and primarily provides intermodal service to VIG, though it does provide service to a few smaller customers as well. It provides competitive dual rail access to VIG for CSX and NS.

VIG rail operations are highly reliant on non-Port trackage and railroad resources, in sharp contrast to NIT's rail operations, where the Port owns extensive on- and near-terminal trackage and uses Port resources to shift rail strings within that trackage.

With the presence of only working tracks on the terminal, the Port coordinates with CWRV to deliver CSX and NS trains from the CWRV Suffolk Marshalling Yard onto the working tracks and subsequently depart loaded trains.

CWRV typically pulls the arriving (export-loaded) train onto the double track segment of the corridor, detaches, and then uses the locomotive to assemble and depart the on-terminal import rail strings. After extracting the departing rail strings, the locomotive is in position to push the arriving train onto the terminal tracks. The locomotive then reconnects to the departing train and pulls to the Suffolk Marshalling Yard for exchange with CSX or NS.

Similar to NIT, Port resources are used to load and unload the trains once they are delivered to the intermodal yard by CWRV, with U.S. Customs and Border Protection responsible for screening import containers prior to loading onto the train. As with NIT, this screening preferably occurs while containers are being moved to the intermodal yard to minimize rehandling costs.

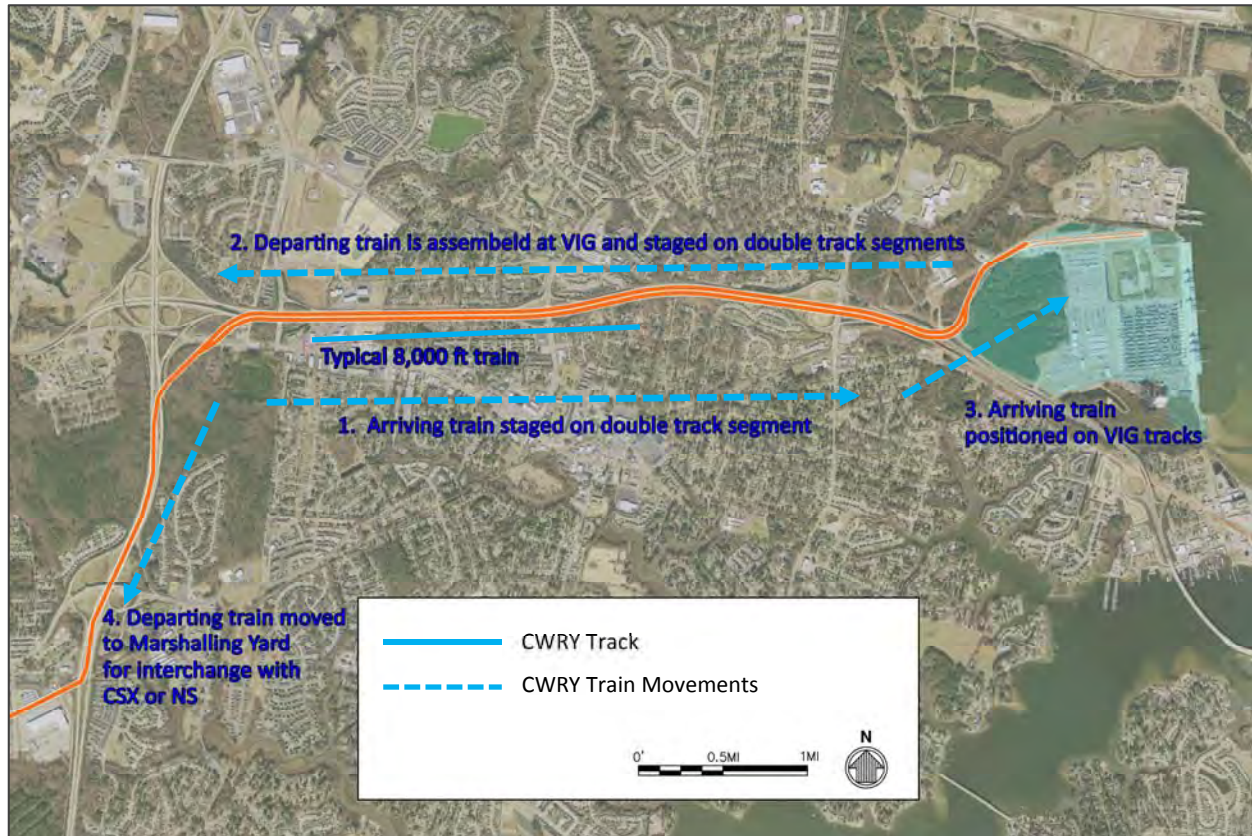


Figure 25 – VIG Rail Operations

5.4.4. Trackage Rights and Access

CWRV is a Class III short-line railroad that provides rail service to VIG and access to CSX and NS. CSX and NS have operating rights from their respective main lines to the Suffolk Marshalling Yard, where the trains are interchanged with CWRV, who then moves them to and from VIG.

5.4.5. Competitive Enhancements

The following improvement concepts were considered as part of the development of the Master Rail Plan to improve The Port of Virginia's competitive position among other ports:

- Improving existing rail access
- Improving community tolerance of Port activities
- Increasing utilization of existing rail resources

The intent of these improvement concepts is to support further discussion between the Port and the railroads, as implementation of such improvements will require close coordination between stakeholders, and, in the case of trackage improvements, approval by the owning entity.

5.4.5.1. VIG Concept 1 - Rail Traffic Flow Improvements

The fluid movement of trains between VIG, its marshalling yard, and on to NS and CSX main lines is a critical element of VIG's ability to provide competitive rail service. Currently, there is sufficient capacity to provide rail service to the existing VIG rail infrastructure. As rail capacity at VIG is expanded, additional improvements on the CWRV corridor will be necessary to support fluid movement of trains and the ability to respond to the needs of the Port.

As rail traffic increases, the single track segment between the marshalling yard and the double track segment will become a constraint to providing responsive service to VIG. Double tracking this segment will permit two way traffic along the corridor. Additional sidings and other improvements may be necessary to accommodate non-Port industrial traffic.

The marshalling yard will likewise become a constraint for coordinating the arrival and departure of Class I trains. Construction of two additional storage tracks (nominally 8,000 L.F. each) will support improved interchange operations, however, two raw water pipelines owned by the City of Norfolk and the City of Portsmouth are parallel to and within the yard's expansion footprint. Construction of additional tracks will likely necessitate relocating the pipelines. A Rail Enhancement Fund grant from DRPT has been authorized to support construction of the two additional tracks; funding for the pipeline relocations has not been identified. The terms and conditions cost of any such relocations have not been fully evaluated.

Additional marshalling yard locations may also need to be considered if site constraints at the existing location limit its expansion potential.

Operation of the interchange tracks and its link to the marshalling yard will need to be evaluated as rail traffic increases. Congestion at this location will be a function of the schedules of NS, CSX, CWRV, and VIG; and will likely require rail improvements to mitigate. The connection between CWRV and CSX, in particular, currently inhibits train speed due to the severe curve, grade, and line of sight geometries. Even though CSX and CWRV coordinate incoming and exiting trains, the limited sight distance of this curve requires CSX to travel very slowly from their line to CWRV across the Main Street and Moore Avenue crossings. The single track corridor between the interchange and the Suffolk Marshalling Yard further constrains rail capacity.

Construction of the future marine terminal to be served by the CWRV corridor will necessitate further improvements and is discussed in Section 5.7.

5.4.5.2. VIG Concept 2 – Crossing Safety/Separation Improvements

The City of Suffolk, which maintains 8 at-grade crossings along the CWRV rail corridor, plus an additional 10 at-grade crossings in the immediate vicinity of the interchange between CWRV, NS, and CSX, frequently fields complaints from its citizens on the impacts of existing rail activity and is therefore very concerned about future rail impacts from increased Port activity, as well as ongoing residential and commercial development.

These concerns and associated mitigation concepts are documented in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015. Concurrently, the City is in the process of updating its comprehensive plan and intends to include additional focus on mitigating the impacts of rail and surface traffic resulting from regional growth in their community.

The goal of these two efforts is to develop a cohesive vision for supporting traffic mobility through strategic grade separation projects, as well as identifying a plan for prioritizing, funding, and executing these projects.

5.4.5.3. VIG Concept 3 – U.S. Customs and Border Protection

Accommodation of competitive dual rail access at VIG imparts other challenges to the Port and Commonwealth Railway. Management of two train schedules (especially if there are delays or other variances) and separate inventories of rolling stock is complex and often requires more trackage and resources to achieve the target throughput. Performing these operations against a backdrop of similarly fluctuating ship line schedules and customer demands further complicates operations.

As with NIT, U.S. Customs and Border Protection personnel at VIG work very closely with the Port to provide the level of support necessary to maintain the stream of commerce through the terminal. However, these resources are not always sufficient to provide the coverage the Port may require at VIG. As rail demand increases, additional U.S. Customs and Border Protection resources may be necessary to support rail operations.

5.4.6. Recommendations to improve rail competitiveness at VIG

Of the concepts identified above, the following are immediately recommended to support improved rail competitiveness at VIG. It is recommended the remaining concepts be coordinated among the Port, railroads and stakeholders if needed to support the Port's strategic growth strategies, provided the many commercial issues are identified and resolved.

Commonwealth Railway Improvements: Double tracking the entire CWRY corridor between VIG and the Suffolk Marshalling Yard in conjunction with a VIG rail expansion is recommended to ensure the rail capacity of VIG can be fully utilized. This improvement is further necessary to support rail traffic generated by the future marine terminal on Craney Island.

As traffic increases, improvements to the interchange tracks and connecting rail segment between the Class I railroad main lines and the Suffolk Marshalling Yard should also be improved to support the Class I rail operations serving VIG. This improvement may also contribute towards lessening community impacts associated with slow-moving trains navigating the interchange.

Rail Crossing Improvement Program: This recommendation is consistent with the recommendations provided for NIT and PMT. The City of Suffolk, in particular, has identified improvements on Finney Avenue and between Shoulders Hill Road and Nansemond Parkway (North Suffolk Connector) to help mitigate rail impacts. Numerous other rail crossings are also of concern and have been identified in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol, dated March 13, 2015.

U.S. Customs and Border Protection Resources: This recommendation is consistent with the recommendation provided for NIT.

As demand increases, the Port may need additional U.S. Customs and Border Protection resources to maintain the level of service to its customers. Currently, the Port works with the local Field Office to formalize and justify requests for these resources as they are needed.

In the event that U.S. Customs and Border Protection is unable to allocate funding to support the requested increases, Section 560 of the Consolidated Appropriations Act, 2014 has authorized U.S. Customs and Border Protection to accept “donations of real property, personal property (including monetary donations) and non-personal services” from private sector and government entities.

If CBP is unable to get necessary additional resources, state support, through the above described “donation” process, may need to be considered as a possible, but not a definite, mechanism to provide the necessary CBP resources. This support would need to be evaluated against potential adverse competitive impacts.

5.5. Virginia Inland Port

Virginia Inland Port (VIP)

- The Port of Virginia's intermodal container transfer facility in Front Royal, VA
- NS rail service from NIT and VIG
- Rail track runs adjacent to NS Crescent Corridor

The Virginia Inland Port (VIP) is an intermodal container transfer facility in Front Royal (Warren County) owned by The Port of Virginia. VIP occupies approximately 161 acres and is approximately 60 miles west of Washington D.C. The terminal brings The Port of Virginia 220 miles closer to inland markets and enhances service to the Washington D.C. / Baltimore Metro Region through regularly scheduled rail service to the terminals in Hampton Roads. VIP also consolidates and containerizes local cargo for export.

5.5.1. Throughput

Current throughput is approximately 35,000 containers per year. Rail strings to and from VIP piggyback on other NS trains, thus capacity is largely controlled by the number of working tracks, frequency of that service, along with the train lengths established by NS.

5.5.2. Rail System Infrastructure

The single rail lead into VIP connects directly to NS's double-tracked Crescent Corridor via a wye junction that allows arrival and departure from either direction. On terminal, the lead splits into five working tracks that then converge to a single dead end tail track at the west end of the terminal.



Figure 26 – VIP On-Dock Rail System

5.5.3. Port-Related Rail Operations

NS provides regularly scheduled intermodal service between NIT and VIP and is responsible for arriving and departing the trains, as coordinated with the Port. NS further breaks each string at one or two locations to facilitate movement of container handling equipment between the tracks and the container yards.

Port resources are used to unload and load the rail cars. Since import containers are screened by U.S. Customs and Border Protection at NIT, this activity is not present at VIP.

5.5.4. Trackage Rights and Access

This facility is connected to NS's Crescent Corridor main line.

5.5.5. Competitive Enhancements

The location and configuration of the terminal precludes any practical measures to establish rail access with a competing railroad.

Additional rail capacity at VIP is generated through coordinated commercial decisions between NS and the Port, and may need to be supported by additional working tracks. Off-terminal rail infrastructure improvement needs, if any, would likely be related to deconflicting train arrival or departure operations at VIP with NS's mainline traffic. As rail traffic increases, mitigation of community impacts from increased rail and surface traffic at the Rockland Road and Fairground Road at-grade crossings (to the southeast and northeast of VIP, respectively) will be increasingly sought. Warren County has expressed concern regarding the Rockland Road crossing due to the mounting rail backups they have observed that restrict access to the approximately 450 homes in the Rockland area. They have also observed increased blockages of the Fairground Road crossing.

The Rockland Road (Rte. 658) crossing is typically blocked while NS is assembling a train for departure, as it is located approximately 3,400 track-feet from the VIP working tracks. When blocked, this also impacts the response time of Fire and Rescue personnel located at the fire station on Rockland Road, making the blocked access a health and safety issue to the community. A Rockland Road grade separation project is identified as a recommended regional roadway improvement in the VDOT 2035 Small Urban Area Transportation Study, but is not currently listed on long range transportation plans.

5.5.6. Recommendations to Improve Rail Competitiveness at VIP

NS did not indicate any specific concerns regarding impacts to NS's mainline rail traffic, but could become a concern in the future. Consistent with other terminals that support rail operations, a state program to provide resources for planning and executing railroad crossing improvements to mitigate rail impacts is recommended, as Warren County has also expressed concern about the impacts of rail to local traffic and emergency vehicle access.

5.6. Port of Richmond (Richmond Deepwater Terminal)

Port of Richmond (POR)

- Virginia Port Authority-leased container, break bulk, and bulk terminal
- Regularly scheduled container barge service (The 64 Express) between POR, NIT, and VIG provides inland access to the marine terminals.
- CSX direct access; ability to interchange with NS via CSX

The Port of Richmond (also referred to as the Richmond Deep Water Terminal) is located on approximately 121 acres along the west bank of the James River south of the City of Richmond. The facility is owned by the City of Richmond and leased by The Port of Virginia under an agreement that began in July 2011. The facility has a 1,570 foot wharf available for berthing and handles containers, break bulk, and bulk cargos.



Figure 27 – Port of Richmond

The James River Barge Service provides regularly scheduled container-on-barge service between the Port of Richmond and the Hampton Roads container terminals (NIT and VIG).

5.6.1. Throughput

The grain export operation was initiated in 2014 and is anticipated to handle approximately 2,500 rail cars over the fall and winter season. Other onsite rail operations handle approximately 240 to 360 rail cars per year.

5.6.2. Rail System Infrastructure

An approximately 3.5-mile long single rail lead connects the Richmond Deep Water Terminal to CSX's South Yard rail yard. There is a 1,500-foot and a 2,850-foot siding located along the lead as well, though they are in need of rehabilitation. The 2,850-foot siding previously had an additional siding, though it has been abandoned. Numerous private industry rail leads are also located on the terminal lead, though most do not currently support active rail operations. The other major rail user is an ethanol operation located near the lead's connection to South Yard.

On terminal, the rail lead has a short (~800-foot) siding which converges to a dead-end tail track. Two rail spurs diverge into four storage tracks (~650-foot each) to warehouses. There is also a dead-end rail spur to a former maintenance shed and siding (that historically accessed the wharf).

Rehabilitation efforts to the rail lead, and more extensive improvements to the on-terminal track, were performed in 2013 and 2014.

The Port also recently constructed a rail car unloading pit and installed a rail scale on terminal to support a grain export operation.

5.6.3. Port-Related Rail Operations

The primary rail operation at POR is the recent establishment of a single car grain export operation. This operation transfers soy beans and other grain products from relatively short strings of rail cars to barges for transport to private terminals in Hampton Roads. Rail cars are consolidated at CSX yards and then delivered as 30 – 40 car strings to the terminal for unloading. It is anticipated that the terminal will be able to unload one string per day during peak season (September – March).

The terminal also currently supports transloading containers of plywood brought in by barge from the Hampton Roads marine terminals to boxcars for subsequent delivery to an inland customer. Rail volume associated with this operation is currently relatively small compared to the grain operations (20 – 30 rail cars per month).

The terminal has supported similar operations in the past with rubber, steel, and other break bulk cargo.

5.6.4. Trackage Rights and Access

The rail lead between the terminal and CSX rail yard is owned by the City of Richmond, which grants operating rights via a service contract. NS and CSX rail traffic must be interchanged with the City's selected rail provider to deliver to the terminal. The City is currently contracted with CSX to provide this rail service.



Figure 28 – Port of Richmond Overall Rail System

5.6.5. Competitive Enhancements

The following improvement concepts were considered as part of the development of the Master Rail Plan to increase the utilization and economic contributions of the Port of Richmond facility.

The intent of these improvement concepts is to support further discussion among the Port, the City of Richmond, railroads, and other economic development stakeholders as implementation of such improvements will require close coordination between stakeholders, and, in the case of trackage improvements, approval by the owning entity.

5.6.5.1. POR Concept 1 – Rail Capacity Improvements

The seasonal grain operation effectively places the terminal at its rail capacity during peak grain season, diminishing opportunities to support other year-round rail operations.

The Port continues to evaluate concepts to expand rail capacity at the Port of Richmond, as there is continued demand for rail service. Concepts have typically been focused on improvements inside the terminal perimeter, but there may be opportunities for off-terminal improvements along the City-owned rail lead.

5.6.5.2. POR Concept 2 – Establishing Competitive Dual Rail Access

Rail service to the Port is established via agreement with the City of Richmond, providing the opportunity to serve the facility by either CSX or NS (who has trackage rights into CSX's rail yard). Concepts to establish rail service by both railroads may be feasible, but the costs and benefits have not been quantified or evaluated. Of particular concern if such an effort is initiated is the availability of rail infrastructure needed to support two separate rail operations.

5.6.5.3. POR Concept 3 – Enhancing Private Industry Development Potential

Rail and road access to the Port of Richmond is segregated from residential and commercial activities by the Interstate 95 corridor, thereby avoiding many of the common issues associated with seeking to increase activity levels. Several private industrial properties are located along the road and rail corridor that accesses the terminal.

The close proximity of industrial sites and absence of non-industrial activities presents the opportunity for coordinated on- and off-terminal industrial development efforts that offer close access to shipping via the James River.

5.6.5.4. POR Concept 4 – Deepwater Terminal Railroad Freight Improvement Plan

The City of Richmond has previously developed a concept to extend the existing rail lead to the north of its connection to CSX's rail yard at Goode Street to provide additional rail access to an industrial site as well as connect to an existing NS rail spur (Rocketts Spur).

5.6.6. Recommendations to Improve Rail Competitiveness at POR

Comprehensive Industrial Master Plan: Industrial development at POR and on the adjacent properties should be bolstered by a coordinated effort among the Port, the City of Richmond, and railroads working towards a common vision of what type of industrial activity is desired. A recommended framework for this is similar to that recommended for PMT:

- The Port should work with the City of Richmond and Virginia Economic Development Partnership (VEDP) to identify the type of terminal activities that generate the most benefit to Commonwealth and the City of Richmond and that are compatible with the river terminal.
- The Port should further work with the City of Richmond to integrate any near-terminal development efforts with on-terminal activities.
- The Port should coordinate with their rail provider(s) and the City to develop a rail plan (or plans) for the terminal that accommodates those specific activities.

These efforts result in a concept that VEDP, Port, and other economic development agencies can market to the industries they seek to attract.

5.7. Future Marine Terminal

5.7.1. Conceptual Rail System Infrastructure

The future marine terminal on Craney Island is envisioned to be a state-of-the-art terminal that makes use of semi-automated stacking cranes to maximize container storage capacity, similar to the system used at VIG. The project represents a substantial increase in The Port of Virginia's overall capacity, with the full build out capacity being on par with the combined capacity of NIT and a fully built out VIG terminal. It is proposed to be constructed on reclaimed land created in the joint State and Federal Craney Island Eastward Expansion (CIEE) project, which constructs additional dredged material storage cells at the U.S. Army Corps of Engineer's Craney Island Dredged Material Management Area.

The current design objective is to provide sufficient rail capacity for up to 50% of total terminal throughput.

The footprint of the conceptual marine terminal supports use of long (~6,000 L.F.) working track lengths, while the use of widespan (6 to 8 tracks) gantry cranes to load/unload from a single side would improve efficiency by reducing the number of rail moves needed during assembly or disassembly (e.g. needing to break a full length train into multiple strings to fit onto the working tracks, or to provide crossings for dray vehicles).

Conceptual rail access would be via an extension of the double-tracked CWRVY corridor from VIG, which would be constructed as part of the Craney Island Road and Rail Connector. This would provide the terminal with competitive dual rail access to both NS and CSX in the same manner as VIG.

Construction of the marine terminal is dependent on the phased completion of the CIEE. The initial phase of the terminal is currently anticipated to open sometime between 2030 and 2040, with subsequent phases of the terminal being constructed as required to support market demand.

5.7.2. Competitive Enhancements

Construction of the future marine terminal will increase rail traffic on the CWRVY rail corridor and in the communities it passes through.

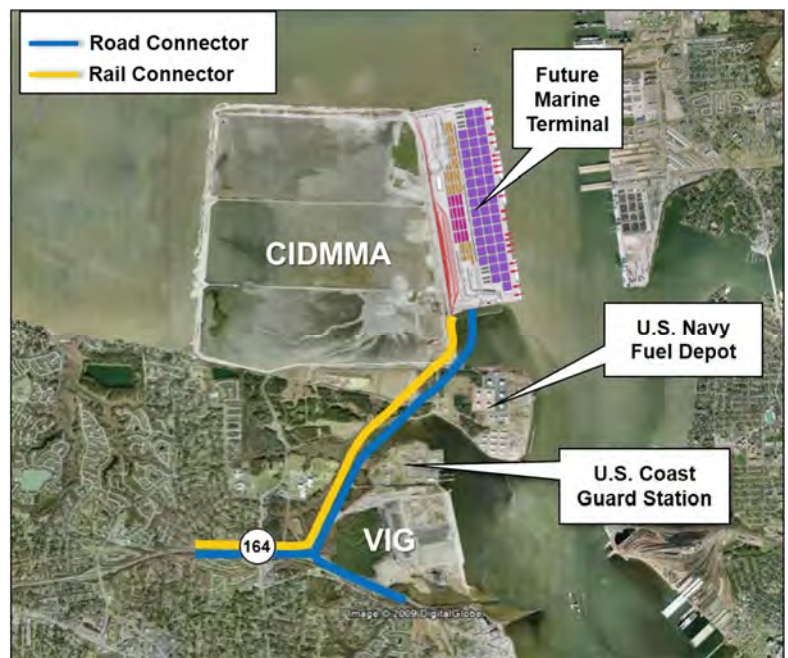


Figure 29 – Craney Island Road and Rail Connector Concept

5.7.2.1. CIMT Concept 1 – Commonwealth Railway Improvements

Infrastructure improvements will be necessary to support the planned rail volume generated by a fully built out VIG terminal and the future marine terminal on Craney Island. The primary rail infrastructure concerns include:

- Double tracking the full length of the corridor to provide two-way rail traffic.
- Improving the rail junction at VIG to support concurrent arrival and departure operations at VIG while maintaining rail access to the future marine terminal.
- Providing sufficient capacity to interchange trains between CWRV, CSX, and NS (including marshalling yard capacity and connections to the Class I railroads' tracks). Preliminary sizing estimates suggests that with both terminals operating at full capacity, approximately 15 marshalling yard tracks (6,000 – 8,000 L.F. each) will be needed, though actual needs will need to be assessed against the rail operations that exist at that future time (Virginia Port Authority *Craney Island Interchange Access Modification Study*, September 2009).
- Acquisition of property necessary to construct the Craney Island Road and Rail Connector has not occurred. In addition to private parcels, right-of-way through the Craney Island U.S. Naval Supply Center and the City of Portsmouth Landfill will be necessary to support the conceptual alignment. This project may also be share an alignment with a proposed highway spur that connects with planned bridge/tunnel harbor crossings (The Third Crossing / Patriot's Crossing projects). This would also entail construction of a new highway interchange on State Route 164.

5.7.2.2. CIMT Concept 2 – Crossing Safety/Separation Improvements

As detailed in the NIT section, additional resources and technical assistance for communities (particularly Suffolk in the case of CIMT) seeking to mitigate rail-related impacts would serve to help sustain community support for not only development of the terminal, but also its full utilization. The *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015 identifies improvements that may help mitigate long term traffic mobility impacts resulting from increased rail traffic through Suffolk.

5.7.3. Recommendations to Improve Rail Competitiveness at the Future Marine Terminal

Coordinated long range planning and land acquisition by DRPT, the Port, CWRV, NS, and CSX is recommended to ensure the improvements identified in Concept 1 above can be realized including identification and acquisition of the expanded marshalling yard location(s). Implementing these recommendations will require the identification and resolution of numerous commercial issues.

Establishing a program to support communities seeking to mitigate rail impacts is likewise recommended, particularly given the magnitude of rail capacity generated by the full build out of the terminal and the concentration of that rail traffic that may travel through the City of Suffolk. The *Suffolk Rail Concepts Screening Report* identifies improvements that could be used as part as part of a comprehensive plan to address these impacts.

6. RAIL CORRIDORS IMPORTANT TO THE PORT OF VIRGINIA

6.1. CSX National Gateway

The CSX National Gateway is a public-private partnership launched in May 2008. The goal of the National Gateway is to create a highly-efficient network of double-stack rail and intermodal terminals from the Mid-Atlantic to the Midwest that connects seaports with consumers and manufacturing centers. The effort, spanning six states and Washington DC, involves 61 clearance projects (49 complete) and six intermodal terminal projects (five complete), including four new facilities and two expanded terminals.

The National Gateway improves the capacity (via double-stack clearances) of the connection between The Port of Virginia and CSX's state-of-the-art hub-and spoke intermodal terminal in Northwest Ohio and has supported increased frequency, improved levels of service, and reduced transit times to the Ohio Valley.



Figure 30 – National Gateway

Virginia worked closely with CSX and the federal government to secure funding and invested \$16 million in Rail Enhancement and other funds in the projects.

The \$850 million project received federal stimulus funding and contributions from four states, including Virginia, with CSX funding 76% of the total project cost and public entities funding approximately \$190 million.

6.1.1. Infrastructure

The CSX north-south main line through Virginia (Washington DC-Richmond-Rocky Mount NC) is part of the National Gateway. At Weldon NC, an eastward extension connects the National Gateway to Port of Virginia facilities in Hampton Roads.

Kilby Yard, located west of downtown Suffolk, provides approximately 28,000 L.F. of sidings to stage intermodal and other unit trains. Existing zoning and land-use approvals are in place for additional intermodal facilities to support industrial development in this vicinity, however they have not been constructed yet.

The project's target 2015 completion, which will provide double-stack access to The Port of Virginia, has been delayed due to an ongoing three-year environmental review of the Virginia Avenue Tunnel, a 108-year old single-stacked, single-tracked rail tunnel in Southeast Washington DC.

The Federal Highway Administration approved a preferred construction alternative for the project in November 2014 which will enable CSX to complete the tunnel design and initiate the construction permitting process. Construction is anticipated to begin within the next several months and last 30-to-42 months. The remainder of the corridor has clearances for double-stacked containers and is predominantly double-tracked.

6.1.2. Capacity

Currently, 53 passenger and commuter trains and an average of 21 freight trains operate over the CSX Richmond, Fredericksburg, and Potomac (RF&P) Subdivision and across the Potomac River each weekday. Windows for freight traffic are limited to over-night and to a lesser extent mid-day, as passenger and commuter trains limit freight capacity on the line between 0600 and 1900. These freight windows ultimately shape the CSX schedule to VIG, and when factored in with the NS rail service at the terminal, it further shapes the potential CSX capacity at VIG. Establishment of CSX double-stack service will improve utilization of the existing rail schedule to convey CSX cargo, but capacity will still ultimately be constrained by the RF&P corridor traffic unless prioritization rules or schedules relating to freight vs. passenger rail are adjusted. The current Richmond-D.C. High Speed Rail Study is reviewing the potential for a third track in order to expand freight and passenger capacity and improve level of service.

Traffic to and from the Port to the Kilby Yard in Suffolk is used for staging trains bound for the Port. CSX did not cite any specific capacity concerns at current volumes, but did indicate improvements would be necessary to support additional trains.

Additional capacity is required on CSX's Portsmouth Subdivision to facilitate port growth, especially potential future agriculture business. Beyond the state-supported Kilby Yard in Suffolk and the expanded grain operations in Richmond, CSX has indicated there is no additional capacity to stage freight destined for the Port.

6.2. Norfolk and Portsmouth Belt Line Railroad

NPBL was established in 1898 by eight railroads as a neutral railroad to provide efficient movement of rail cargo between Hampton Roads industries and those railroads. Since then, the shareholder railroads have undergone numerous consolidations, resulting in Hampton Roads now being served by two Class I railroads, CSX and Norfolk Southern, who are likewise the shareholders of NPBL with 43% and 57% ownership stakes, respectively.

NPBL's charter establishes that it must move all railcars for a fixed rate regardless of the originating railroad or destination.

NPBL's location within the urban industrial areas of Portsmouth and Chesapeake, and access to PMT and NIT, bring it in frequent contact as the local railroad with prospective industries evaluating sites for new facilities.



Figure 31 – NPBL Rail System

6.2.1. Infrastructure

NPBL's rail system is located in Portsmouth and Chesapeake, with operating rights to NS's Portlock Yard and NIT. At NIT, NPBL provides rail service to a cold storage facility and for project/dimensional cargo originating with or bound for CSX customers. A private industry, Lehigh Cement, retains a parcel within NIT and is served by NPBL as well. NPBL provides switching operations for various industries along their systems as well as along Sewell's Point Line.

NPBL's rail system has four primary rail yards, along with several other sidings. The South Street Yard in Portsmouth near Portsmouth Boulevard and Frederick Boulevard has recently been expanded (with further expansion opportunities available) to support increased rail demand from its customers using both CSX and NS.

A second yard at Freeman Avenue in Chesapeake is planned for expansion in conjunction with the construction of a grade-separated crossing, which will improve roadway traffic and emergency response to the industrial facilities that are land locked through this single point of access on Freeman Avenue. This project will improve train movement across NPBL's one major bridge, which crosses the Southern Branch of the Elizabeth River.

The PMT rail yard currently has four tracks, but historically had significantly more – NPBL retains the Right-of-Way to expand the yard if customer demand warrants. CSX presently leases this yard to support its own intermodal facility.

The Berkley Yard is NPBL's fourth and largest facility. It serves as the nexus between NPBL's Portsmouth and Chesapeake lines, and the CSX and NS rail systems.

Due to the urban environment and prevalence of at-grade crossings, existing storage tracks on the NPBL system are generally not long enough to accommodate entire unit trains on a single track and requires them to be broken into shorter segments.

NPBL's bridge over the Southern Branch of the Elizabeth River (the Belt Line Bridge) is a single track lift bridge and is the link for NPBL to move Class I trains to terminals they do not have direct access to (NS to PMT and CSX to NIT). By Coast Guard regulation, vessel traffic has right-of-way over rail traffic on the bridge, which must be lifted to accommodate most traffic. Due to the high volume of vessel traffic on the Southern Branch, the bridge is typically kept in the lifted position and lowered only to allow trains to cross.

As this bridge is one of only three rail bridges that cross the water, the single track structure limits capacity of any NPBL or CSX traffic crossing to the east side of the Elizabeth River.

NPBL traffic to NIT, after crossing the Jordon Lift Bridge, passes through NPBL's Berkley Yard and then ties into a double tracked segment of NS's Lambert's Point Line towards Portlock. A wye connection provides a direct connection between the Lambert's Point Line and the Sewell's Point Line, but has a constrained geometry that limits the length of rail cars that can use it. Trains unable to, or directed not to, use this connection must be pulled into Portlock and the locomotive disconnected and moved around the cars to continue pulling to NIT via the Sewell's Point Line (See Section 5.2.3 for additional discussion), which adds delay to every train using this area of the rail network. These impediments affect both NPBL and CSX traffic on the NPBL system.

6.3. NS Crescent Corridor

The NS Crescent Corridor connects the American Northeast with the western portion of the American Southeast, and, in conjunction with Kansas City Southern, also Texas and Mexico. In addition to existing terminals, the Crescent Corridor connects with three new intermodal terminals at Birmingham, AL, Greencastle, PA, and Rossville, TN.

This initiative was a \$25 billion, nine-state, and 2,500 mile network designed principally for intermodal traffic between New Orleans and Newark, New Jersey, that NS has promoted as a public-private partnership since the early 2000s.

In Virginia, the Crescent Corridor has two north-south main lines, one connecting Washington DC-Manassas-Charlottesville-Altavista-Danville and extending into North Carolina, and the other connecting Charles Town, WV -Berryville-Virginia Inland Port-Luray-Waynesboro-Roanoke and from Roanoke extending southward into North Carolina, and also southwestward into Tennessee.

Norfolk Southern did not express any specific concerns regarding rail capacity on the Crescent Corridor.



Figure 32 – Crescent Corridor

6.3.1. Capacity

NS did not identify any capacity concerns on the Crescent Corridor within Virginia. The corridor is primarily single-tracked through Virginia, but passing sidings and extended double-tracked segments support fluid movement of rail traffic in both directions.

6.4. NS Heartland Corridor

In 2010, NS opened its Heartland Corridor, which allows double-stack trains to move between Norfolk and Chicago. The project was a public-private partnership of NS, the federal government, and the states of Virginia, West Virginia and Ohio, and involved improving the vertical clearance of 28 tunnels and eliminating 24 other obstructions, such as bridges. Virginia worked closely with NS and the federal government to secure funding and invested \$75.6 million in Rail Enhancement and other funds in the project.

In Virginia, the Heartland Corridor connects Norfolk (Ports of Virginia) and Roanoke and then extends into West Virginia. The corridor also supports the daily Norfolk-to-D.C. passenger service.



Figure 33 – Heartland Corridor

6.4.1. Infrastructure Capacity

NS did not identify any capacity concerns on the Heartland Corridor within Virginia. Significant segments of this corridor are double tracked to support fluid movement of rail traffic in both directions.

7. RAIL ACCESS COMMENTARY

Dual access represents one potential opportunity (of many) to improve overall port competitiveness. The typical context of competitive dual rail access is when a customer has the opportunity to select which railroad to transport cargo through.

Where industries are able to maintain active rail operations with both railroads, dual access is also a means to expand their potential inland customer base, where individual customers may be tethered to a single railroad.

Table 9 – Constraints to Competitive Dual Rail Service for Various Forms of Dual Rail Access

ON-DOCK DUAL RAIL ACCESS PROVIDED BY	PHYSICAL AND OPERATIONAL CONSTRAINTS TO COMPETITIVE DUAL RAIL SERVICE
Both railroads operating over the same infrastructure (i.e. trackage rights) to a terminal	- Increased complexity to coordinate operations may adversely impact effective capacity of the rail infrastructure and/or cost of operation; may require additional infrastructure to achieve a desired throughput. - Prioritization of traffic between the railroads may not be optimally aligned with the needs of the Port.
Direct access by one railroad and access by the second through an intermediary (short line) NIT: NS, CSX via NPBL PMT: CSX, NS via NPBL POR: CSX, NS via CSX NNMT: CSX, NS via CSX	- Introduces additional operations (costs) for the non-owning railroad to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be effectively aligned with the needs of the Port.
A common carrier (short line) transporting both railroad's trains to a terminal. VIG: Both NS and CSX via CWRV	- Introduces additional operations (costs) to rail service (relative to a single provider) due to the need to interchange with a second railroad. - The impact of this service to the overall competitiveness of the operation is dependent on the nature of underlying service charters or other agreements between the common carrier, port, and Class I railroads. - May require additional infrastructure on part of the short line and/or the terminal to segregate rolling stock.
Separate rail infrastructure for each railroad	May require significant footprint within terminal to accommodate.

- | | |
|--|---|
| | <ul style="list-style-type: none"> • Rail corridor construction is an enormous undertaking, particularly in urbanized areas (significant community impacts). |
|--|---|

Competitive dual rail access for containers is available at VIG and is planned for the future marine terminal on Craney Island. NIT, the Port's largest container terminal, presently provides scheduled on-dock container rail service only to NS trains due to the competitive advantage inherent in being located on a rail line which NS owns and which CSX must access through an intermediate carrier (NPBL). A significant limitation to concepts that seek to provide dual rail access through expansion of trackage rights is that granting such trackage rights is strictly between the railroads and is a matter of interstate commerce outside the jurisdiction of the state.

Measures to mitigate the operational and physical constraints to competitive dual rail access need to be evaluated in terms of the overall competitive position of the Port (i.e. the cost of mitigation vs. the benefit of doing so). Potential means for the Port to improve its competitive position through mitigation of existing rail access conditions is **an overall port-wide approach to competitive dual rail access** that includes:

- Strategic alignment of ship lines, where possible, to maximize availability of rail capacity for those ship lines with significant rail cargo (in consideration of multiple complex factors, of which rail is only one element).
- Ongoing coordination among the Port, railroads, and other stakeholders (e.g. U.S. Customs and Border Protection) to align resources and seek process optimizations that benefit all parties.
- Improved utilization of off-dock intermodal yards via drayage or barge service, if unable to meet demand with on-dock rail.
- For locations where tenant development is being sought (e.g. PMT) and may have tenants served by different railroads, development operating procedures and strategies to coordinate tenant operations and define expectations for level of service.
- Strategic investments in infrastructure where operational constraints cannot be overcome.

For the other principal facilities of The Port of Virginia:

- NNMT is served only by CSX with no competing railroads in close proximity.
- VIP is located on the NS main line with the nearest CSX line approximately six miles away. Seeking to provide a connection to CSX would, at a very minimum, require a significant capital investment likely to exceed its potential benefits.
- Rail access to the Port of Richmond is off of a CSX facility that NS has trackage rights into. Actual rail service to POR from the CSX facility is via a contract with the City (currently with CSX).
- The future marine terminal on Craney Island is planned to also have dual rail access via CWRV.

8. CONCLUSIONS

8.1. Master Rail Plan Findings

8.1.1. Intermodal Rail

The Port's capacity to transfer containers between the ship lines and railroads at a sufficient level of service to meet customer requirements is an interaction of several elements, each of which may be constrained by different factors. Major capacity elements include:

- Availability and productivity of Port resources (labor, container handling equipment)
- Availability of railroad resources (rail cars, locomotives, crews)
- Availability of U.S. Customs and Border Protection (CBP) resources to screen import cargo
- Alignment of Port, railroad, and CBP resource availabilities
- Port and railroad infrastructure and operational capacity to support the full range of cargo operations
- Impact of port operations on surrounding communities and affected industries

At The Port of Virginia, the coordination of many of these elements have private and/or competitive elements and are worked through in confidential settings with limited public transparency. Within this environment, the Master Rail Plan makes the following observations:

Table 10 – Summary of Observations

OBSERVATION	DISCUSSION
The Master Rail Plan acknowledges that resource allocations are made outside of the Master Rail Plan by the Port Authority and the General Assembly. Resource allocations by the railroads, both capital and operating, are private business decisions.	The Commonwealth and the U.S. Government have invested more than \$300 million in public funds to support rail infrastructure supporting the Port, alongside equivalent federal investments in the Heartland, National Gateway and Crescent rail corridors benefitting the Port.
Trackage rights can introduce complexities to providing dual access to facilities that precludes readily apparent solutions from being viable.	Trackage rights are regulated at the federal level and there is very limited ability to compel a railroad to grant competitive access to another railroad. Existing trackage rights, particularly on the rail networks serving facilities in Hampton Roads, are fairly complicated. It is not uncommon for entities seeking improved rail access to suggest solutions that involve expansion of trackage rights, either due to being unaware of existing rights, or not fully appreciating the magnitude of the request.

OBSERVATION	DISCUSSION
U.S. Customs and Border Protection (CBP) personnel work closely with the Port to provide the support necessary to maintain the stream of commerce through the terminal, to the extent their own labor policies and resources can manage. Despite local CBP Field Office's best efforts, these resources are not always sufficient to provide the coverage the Port may require at NIT.	• CBP labor policies and resource availability limit its ability to adjust screening coverage to meet the changing and day-to-day needs of Port operations. • As rail demand increases, additional CBP resources may be necessary to support rail operations at the Port. • Infrastructure improvements at NIT and VIG are available to reduce the manpower resources required to meet CBP screening requirements. • The burden of funding these improvements has shifted to the Port. • The 2014 Consolidated Appropriations Act establishes a possible, but not a definite, mechanism for the state to provide supplementary funding to CBP. The competitive impact of doing so would need to be carefully evaluated.
Alignment of Port, railroad, and CBP resources is typically coordinated at the local level. However, many key decisions affecting local operations are made at the regional or national levels.	• As one example, the schedule for CSX trains at VIG is compressed by the national and regional schedules for passenger trains and to a lesser degree freight trains due to the mainline track capacity shortages between Richmond and Fredericksburg. • The Port and CBP have limited resources to support this schedule, resulting in reduced level of Port and CBP service for CSX cargo. • This places pressure on the Port and CBP to allocate additional resources. • Operational solutions may be feasible if coordinated among all stakeholders.
Investment in rail infrastructure is a common solution to Port rail capacity concerns, but may not be the only solution.	• The Port, the Commonwealth, and railroads routinely plan and invest in infrastructure improvements through their respective capital programs, special appropriations, and dedicated funding sources such as the Rail Enhancement Fund. • Conversely, dedicated resources to support coordination of interdependent freight and passenger rail operational services among the railroads, the Port and CBP have not been established.

OBSERVATION	DISCUSSION
	• An entity focused on supporting freight-related concerns within the state, such as OIPI or a new Office of Freight Planning, as have been successful in other states, may be useful for coordinating and advocating solutions between stakeholders.
The resources and obligations of the railroads and the Port are focused on supporting the movement of freight and often do not address resultant community or individual business impacts.	• Increasing rail traffic to and from the terminals results in increased traffic delays at rail crossings throughout Southside Hampton Roads. • Southside Hampton Roads rail traffic, including Port intermodal traffic, converges through downtown Suffolk. • Expansion of Commonwealth Railway's infrastructure to support VIG may require relocation of two large water pipelines owned by the City of Norfolk and the City of Portsmouth. • Resources and plans to mitigate community or individual business impacts of Port rail activities are inconsistent and/or deficient. • Clear guidelines to establish grade separation needs and funding would benefit the Port, the surrounding communities, and the railroads.

8.1.2. Other Rail Opportunities

There is potential to support other rail-served activities at several of the Port's facilities, including Portsmouth Marine Terminal (PMT) and Port of Richmond (POR). To this end, the Master Rail Plan includes the following observations:

- The Port has thus far remained open to a broad range of prospective industries, for example bulk agricultural exports or automobile imports.
- The unique needs of each industry and the potential for operational conflicts limits the opportunity to fully plan development of the Portsmouth or the Richmond terminals without a long-term commitment to one or more targeted industries or activities.
- The Port generally has the capacity and willingness to assist prospective industries with developing on-terminal solutions.
- Other economic development entities may be better positioned and have the necessary resources to assist prospective industries with developing off-terminal elements of a new operation.
- Realization of major industrial development opportunities can be improved through further coordination between on- and off-terminal improvements where proposed operations cannot be wholly accommodated on-terminal.

As with all aspects of transportation, infrastructure and operational needs are driven by public and private land use decisions. The Port has the clear authority to plan, fund and regulate on-terminal land uses. However, seaports are part of a global supply chain connecting disparate activities and bringing producers and consumers together in a competitive and increasingly efficient manner. All seaports are directly affected by the location and intensity of production, distribution and consumption activities outside the individual marine terminal.

Virginia was one of the early pioneers in stimulating rail-related economic development through the Virginia Inland Port in Front Royal. Equivalent opportunities exist today outside the gates of the Portsmouth Marine Terminal and the Port of Richmond. However, the ability, resources, and authorization for such initiatives are likely best found through collaboration among The Port of Virginia, the Virginia Economic Development Partnership, and supporting local and regional agencies, provided the Commonwealth develops clear benchmarks and goals to guide those efforts.

8.2. Recommendations

Traditional transportation plans yield a map with specific capital improvements. ***This Master Rail Plan follows a period of significant capital investment in rail and rail-related facilities, and the immediate priority of this Master Rail Plan is earning an appropriate level or rate of return on those prior rail investments, better collaboration among major stakeholders, and a process for ongoing operational improvements, out of which additional infrastructure improvements may be identified.*** However, this Master Rail Plan also contains a list of potential capital improvements (Recommendation 4) which should be considered in light of the more immediate operational, administrative, and strategic decision making recommendations (Recommendations 1-3).

Recommendation 1: State planning and investment in rail infrastructure serving the Port should maximize utilization of existing rail and rail-related infrastructure among all parties.

- Designate an existing entity (e.g. OIPI) or create a new entity (e.g. Office of Freight Planning) to facilitate continuous and comprehensive coordination efforts among the Port, railroads, passenger rail, U.S. Customs and Border Protection, and other stakeholders to optimize rail service to the Port through improved alignment of schedules and resources. Similar efforts have been successful at other U.S. ports and in the Virginia I-95 rail corridor.
- The Port should provide regular input to, and collaborate with, this entity to evaluate and establish achievable and sustainable goals for rail intermodal service across the entirety of the Port.
- Focus of these efforts should include identification of critical infrastructure needs that are not readily apparent to any one stakeholder, conducting more accurate benefit/cost assessments, development of analytical tools and supporting data collection to support better decision making, and exploring cost-and risk-sharing opportunities.
- Designated entity should also regularly review public funding programs for rail, port, and highway infrastructure and operations to ensure that operational enhancements, such as use of mechanisms to provide supplemental funding to U.S. Customs and Border Protection operations, receive due consideration in such programs.

- A wide variety of performance expectations, performance incentives, and performance standards have been established as justification for public investment in rail infrastructure. The Commonwealth and the Port should ensure, in a transparent and collaborative fashion, that those expectations, incentives and standards all contribute to the overall goals of The Port and the Commonwealth.

Recommendation 2: Develop policies and/or programs to support local infrastructure planning and investment where rail activity occurs.

- Designate a lead individual or entity to explore programs to assist communities with coordination, planning, and funding of improvements to mitigate rail impacts, including quiet zones, crossing safety improvements, and grade-separated crossings, with short-term emphasis on the Commonwealth Railway corridor and Class I corridors in the vicinity of the CWRV interchange. Similar programs adopted by other states include California's Section 190 Grade Separation Program and North Carolina's Sealed Corridor Project.
- Designate a lead individual or entity (e.g. the entity designated in Recommendation 1) to explore program options for ensuring that existing, rail-served industries are not disadvantaged by other rail projects and programs.
- Establish a process for the Commonwealth to develop guidelines and metrics for use in prioritizing and justifying community and industrial mitigation efforts.

Recommendation 3: Where opportunities to foster Port-served private industrial activities are present, maximize the value of Port assets by improving coordination of on- and off-terminal development.

- Given the value and scarcity of Port property and the access it provides to deep draft vessels, the Port should evaluate, on a case-by-case basis, the extent to which it accommodates prospective private rail-served industrial operations within its terminal boundaries. If the Port determines an attractive operation cannot be wholly accommodated within a terminal, a lead individual or entity such as VEDP or DRPT should be designated to coordinate roles, responsibilities, and resources among stakeholders to evaluate and develop off-terminal rail facilities that could support realization of the opportunity.
- The designated lead individual should use this Master Rail Plan to assist with the identification, coordination, and development of off-terminal needs.
- Off-terminal development plans should seek to support other terminal rail activities where feasible and practical to maximize potential use as rail needs evolve over time.
- Off-terminal rail development plans should preserve the opportunity for competitive dual rail access to the terminal(s) it supports.

Recommendation 4: The Master Rail Plan identifies off-terminal impacts and constraints as intermodal rail traffic increases at NIT, VIG, PMT, and a future marine terminal. The following efforts will support near-term competitive improvements or community relief for intermodal rail activities, provided that the host railroad accepts the improvements and any associated conditions, and that planned terminal expansions occur as currently planned.

4A - Norfolk International Terminal (NIT)

- Double-tracking the rail line between Portlock and NIT would lower operational costs for NS, NPBL, and other railroads that all use the line.
- A direct connection between Lambert's Point line used by NPBL and the rail line to NIT once existed; reconstructing it would improve access for NPBL to serve its customers on the Sewell's Point Line.
- Establish storage for a complete unit train (i.e. no breaking) on NPBL system in order to stage longer trains.

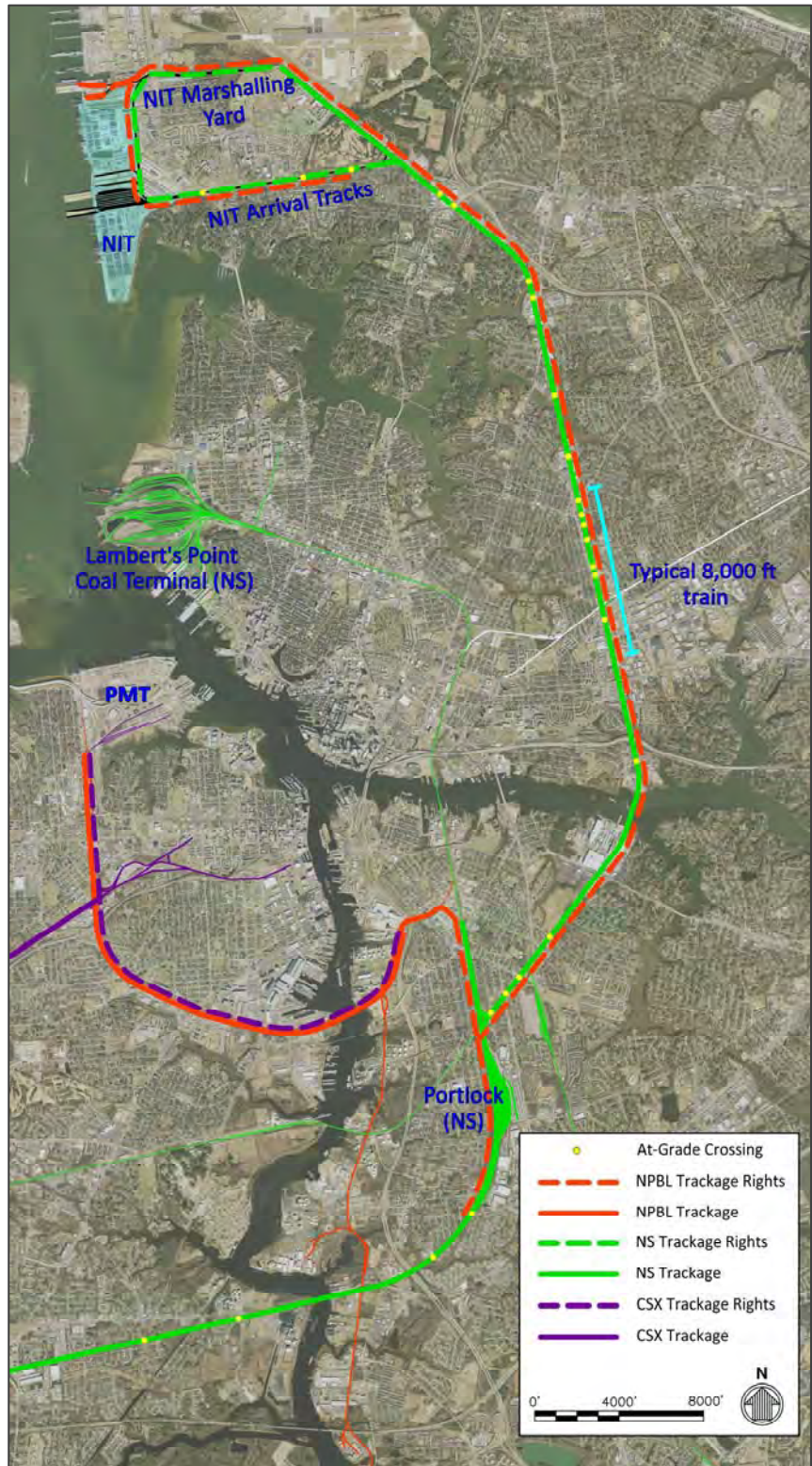


Figure 34 – NIT Overall Rail System

4B - Virginia International Gateway (VIG)

- Commonwealth Railway (CWRV) corridor should be double-tracked along its full length to support increased rail traffic at VIG.
- CWRV's Suffolk Marshalling Yard should have two additional tracks constructed (already partially funded by an REF grant).
- The interchange between CWRV and the Class I railroads in Suffolk should be evaluated for improvements.
- Related community impacts resulting from increased rail traffic should be identified and mitigated through the program described in Recommendation 2.¹

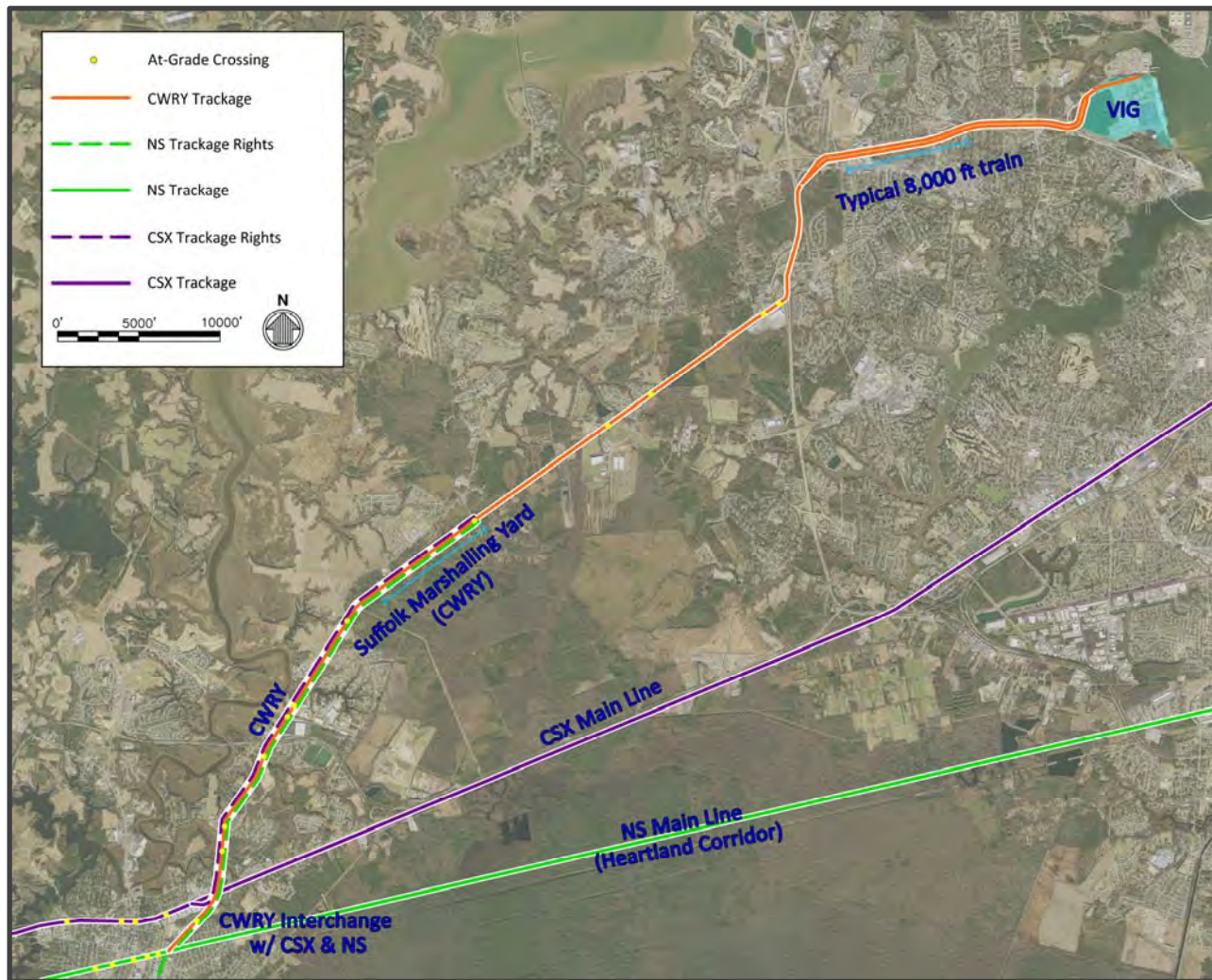


Figure 35 – VIG Overall Rail System

¹Improvements to mitigate long term traffic mobility impacts resulting from increased rail traffic, including traffic generated by VIG and CIMT have been identified in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015.

4C - Portsmouth Marine Terminal (PMT)

- If competitive rail operations are established at PMT, improvements to circumvent the physical constraints of the Pinner's Point interchange could mitigate some potential rail conflicts. This would likely require off-terminal property to construct.
- There are likely on-terminal solutions to mitigate rail conflicts on the east lead, once Midtown Tunnel construction is complete, but those will depend on any on-terminal activities or users.

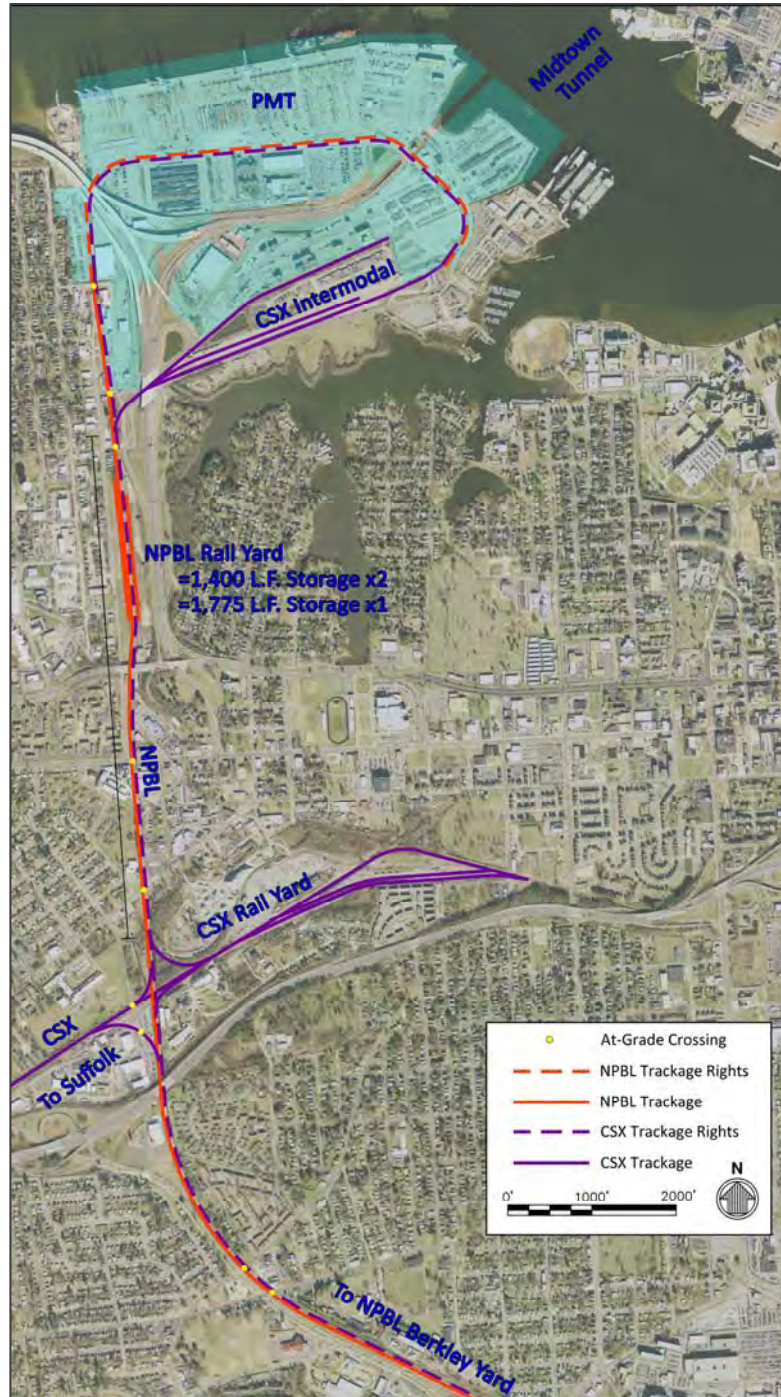


Figure 36 – PMT Overall Rail System

4D - Newport News Marine Terminal (NNMT)

- Engage with CSX to address vertical clearance restrictions on the Peninsula Subdivision that currently limit the height of rail cars (in particular, multi-level automobile carriers) may allow The Port to more effectively compete for automobile cargo and other breakbulk cargo through NNMT.

4E - Future Craney Island Marine Terminal (CIMT)

- Property for the rail corridor needs to be acquired.
- A significantly larger CWRV marshalling yard will be necessary to support CIMT at full build out. A process to identify potential sites for this yard should be initiated.
- Improvements will be needed near VIG to allow CIMT traffic to pass while trains arrive at or depart from VIG.
- Related community impacts must be identified and resolved¹.

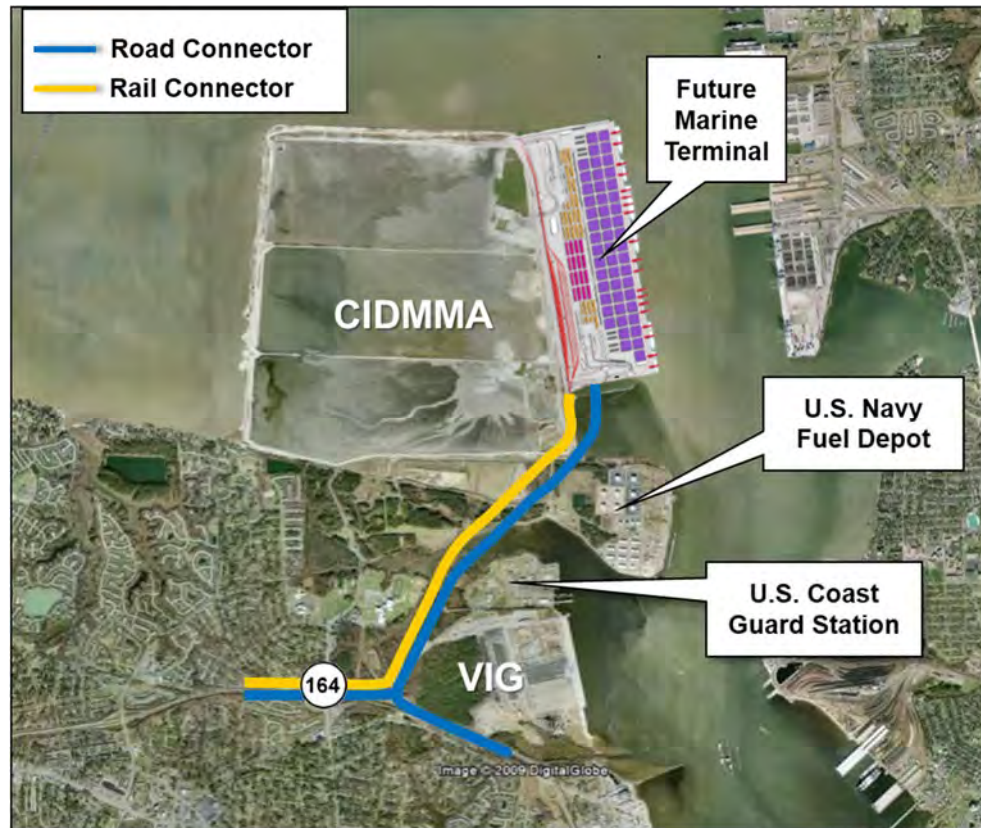


Figure 37 – Craney Island Road and Rail Connector Concept

While the above efforts are intended to improve the competitive position of The Port of Virginia, the improvements recommended herein would be above and beyond the considerable progress made at The Port in 2014 to maintain the longstanding success of The Port of Virginia.

¹Improvements to mitigate long term traffic mobility impacts resulting from increased rail traffic, including traffic generated by VIG and CIMT have been identified in the *Suffolk Rail Concepts Screening Report*, by Moffatt & Nichol dated March 13, 2015.

Appendix A

Summary of Findings Pertaining to SJR 69-specified Issues

1. STATUS & CHARACTERISTICS OF CURRENT RAIL SYSTEMS THAT SUPPORT THE PRINCIPAL FACILITIES OF PORT OF VIRGINIA ON-DOCK RAIL SYSTEMS**Principal Facilities of The Port of Virginia On-Dock Rail Systems**

Norfolk International Terminals (NIT)	• Central on-dock rail system (Central Rail Yard). • Adjacent marshalling yard to assist with train inventory. • A soon-to-be-completed grade separated crossing on Hampton Boulevard at north end of terminal. • Rail throughput in 2013 was approximately 280,000 containers and is growing. • New rail processes anticipated to increase capacity and efficiency.
Portsmouth Marine Terminal (PMT)	• A single track connects PMT to CSX and NS (via NPBL). • Two vehicle ramps are located on the west side of the terminal.
Newport News Marine Terminal (NNMT)	• Multiple dead-end rail spurs primarily support a terminal tenant. • Project and break bulk cargo are supported by the rail spurs on an as-needed basis.
Virginia International Gateway (VIG)	• Two groups of three tracks approximately 2,375 LF in the intermodal yard. • Dual rail access for CSX and NS through CWRY. • Rail throughput in 2013 was approximately 150,000 containers and is growing. • Capacity limited by mix of cargo demand and rail service.
Virginia Inland Port (VIP)	• Rail service provided by NS. • Rail throughput in 2013 was approximately 35,000 containers.
Port of Richmond (POR)	• 3.5 mile long single rail connects POR to the CSX South rail yard w/ two sidings. • Supports seasonal rail to barge grain operations and other break bulk.

1. STATUS & CHARACTERISTICS OF CURRENT RAIL SYSTEMS THAT SUPPORT THE PRINCIPAL FACILITIES OF PORT OF VIRGINIA ON-DOCK RAIL SYSTEMS**Rail Corridors Important to the Port of Virginia**

CSX National Gateway	• Project to create a double-stack corridor between the Mid-Atlantic and the Midwest. • Only the Virginia Avenue Tunnel in Washington, D.C. does not have enough clearance for double-stack freight trains. • The Virginia Avenue Tunnel modifications delayed by environmental studies. • Passenger/freight rail traffic congestion on Fredericksburg-D.C. corridor constrains freight movements.
Commonwealth Railway	• An approximately 19 mile rail corridor connects VIG to CWRY Interchange. • Provides CSX and NS access to VIG via CWRY. • Approximately 3.8 miles of rail outside of VIG is double tracked. • The Suffolk marshalling yard, 10 miles from VIG has two 8,000 LF sidings.
Norfolk Portsmouth Belt Line	• Connects rail-served industries in Portsmouth and Chesapeake to CSX and NS • Owns single track rail lead to PMT. • Maintains rail yards within Portsmouth and Chesapeake to move local rail between customers and Class I railroads.
NS Crescent Corridor	• 2,500 mile rail network that connects the American Northeast and the western portion of the American Southeast, Texas and Mexico. • Two north-south main lines converge in Virginia. • Virginia Inland Port is located on this corridor.
NS Heartland Corridor	• Major east-west rail corridor with double-stack clearance between Norfolk & Chicago. • Connects to the Crescent Corridor in Roanoke. • Originates at NS's Portlock Yard and used by intermodal traffic from NIT and VIG.

1. STATUS & CHARACTERISTICS OF CURRENT RAIL SYSTEMS THAT SUPPORT THE PRINCIPAL FACILITIES OF PORT OF VIRGINIA ON-DOCK RAIL SYSTEMS**NS Sewell's Point Line**

- 8.5 mile long corridor between NS's Portlock Yard and NIT.
- Primarily single track with sidings.
- Includes a single track swing bridge over the Eastern Branch of the Elizabeth River.
- Currently handles 10 - 15 trains per day by NS, NPBL, CA, and BCR.

**CSX Peninsula Subdivision
(Newport News – Richmond Line)**

- Rail corridor between Newport News coal terminals and Richmond
- Majority of crossings are grade separated.
- The line has available capacity to handle NNMT activities.
- Minor vertical clearance restrictions; CSX has identified the necessary infrastructure improvements to mitigate if warranted by rail demand.

2. DEVELOPMENT OF A RAIL MASTER PLAN WITH THE FLEXIBILITY TO SUPPORT NEAR- & LONG-TERM BUSINESS OPPORTUNITIES AT PORT FACILITIES

Norfolk International Terminals (NIT)	• NIT is primarily a container terminal. • There are locations on the terminal that have not been redeveloped for modern port operations that may support other business opportunities. • These opportunities must be carefully screened to avoid impacting container operations. • Largest hurdle likely to be the magnitude (cost) of redevelopment at these locations needed to support any new operation.
Portsmouth Marine Terminal (PMT)	• Available for new business opportunities • Establishing the initial rail-served tenant will affect the opportunities for establishing other rail-served tenants. • Port-established rail operating procedures and track management plan recommended for coordinating tenant rail operations.
Newport News Marine Terminal (NNMT)	• Terminal is near full utilization for its general cargo operations • Limited opportunity for introduction of any additional large operations on-terminal without displacing an existing operation, but may support smaller operations. • May be opportunities for near-terminal operations, but must be coordinated with City's vision for the area. • May be long-term opportunities generated by private rail corridor and marine terminal interests.
Virginia International Gateway (VIG)	• The VIG terminal's master plan is focused on container operations. • Effectively no opportunity for consideration of additional on-terminal operations without impacting container operations. • Near-terminal opportunities may be present.
Virginia Inland Port (VIP)	• Available sites on- and off- terminal for business opportunities that seek intermodal access to the Port's marine terminals.

2. DEVELOPMENT OF A RAIL MASTER PLAN WITH THE FLEXIBILITY TO SUPPORT NEAR- & LONG-TERM BUSINESS OPPORTUNITIES AT PORT FACILITIES**Port of Richmond (POR)**

- Available sites on-terminal for facility development; rail operations may require additional rail to support.
- Opportunity for to integrate near-terminal industrial development with the terminal using underutilized industrial sites along Deepwater Terminal Boulevard.

Craney Island Marine Terminal

- Long-term opportunity to substantially increase Port of Virginia's container capacity
- Terminal concept includes significant rail capacity (~1.4M containers/year)
- Planned to have competitive dual rail access via CWRY.

3. IDENTIFICATION OF ANY OPERATIONAL & PHYSICAL CONSTRAINTS OR LIMITATIONS ON PROVIDING EFFICIENT & COMPETITIVE DUAL RAIL ACCESS SERVICE TO THE PORT FACILITIES & RECOMMENDATIONS TO MITIGATE THEM TO THE EXTENT PRACTICABLE

Terminal	Existing Competitive Rail Access	Operational and Physical Constraints to Efficient & Competitive Dual Rail Access Service	Mitigation Measures
Norfolk International Terminals (NIT)	NS CSX (via NPBL)	- Introduces additional operations for the non-owning railroad to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be effectively aligned with the needs of the Port.	- Strategic alignment of ship lines to maximize availability of rail capacity for those ship lines with significant rail cargo, in consideration of multiple other factors. - Improved utilization of off-dock intermodal yards via drayage or barge service, if unable to meet demand with on-dock rail.
Portsmouth Marine Terminal (PMT)	CSX NS (via NPBL)	- Introduces additional operations for the railroad with indirect access to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be effectively aligned with the needs of the Port.	- For locations where tenant development is being sought (e.g. PMT) and may have tenants served by different railroads, develop operating procedures and strategies to coordinate tenant operations and define expectations for level of service. - Support strategic investments in infrastructure where operational constraints cannot be overcome.

3. IDENTIFICATION OF ANY OPERATIONAL & PHYSICAL CONSTRAINTS OR LIMITATIONS ON PROVIDING EFFICIENT & COMPETITIVE DUAL RAIL ACCESS SERVICE TO THE PORT FACILITIES & RECOMMENDATIONS TO MITIGATE THEM TO THE EXTENT PRACTICABLE

Newport News Marine Terminal (NNMT)	CSX NS (via CSX)	- Introduces additional operations for the non-owning railroad to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be effectively aligned with the needs of the Port.	Current and anticipated rail demand for NNMT does not warrant active investigation of mitigation measures.
Virginia International Gateway (VIG)	CSX (via CWRV) NS (via CWRV)	- Introduces additional operations to rail service (relative to a single provider) due to the need to interchange with a second railroad. - May require additional infrastructure on part of the short line and/or the terminal to manage both railroads' rolling stock.	- Strategic alignment of ship lines to maximize availability of rail capacity for those ship lines with significant rail cargo, in consideration of multiple other factors. - Consider solutions to improve utilization of off-dock intermodal yards via drayage or barge service, if unable to meet demand with on-dock rail. - Ongoing coordination between the Port, railroads, and other stakeholders (e.g. U.S. Customs and Border Protection) to align resources and seek process optimizations that benefit all parties.
Virginia Inland Port (VIP)	NS	Terminal has access to NS mainline only.	N/A

3. IDENTIFICATION OF ANY OPERATIONAL & PHYSICAL CONSTRAINTS OR LIMITATIONS ON PROVIDING EFFICIENT & COMPETITIVE DUAL RAIL ACCESS SERVICE TO THE PORT FACILITIES & RECOMMENDATIONS TO MITIGATE THEM TO THE EXTENT PRACTICABLE

Port of Richmond (POR)	CSX (City Contract) NS (via CSX)	- Introduces additional operations for the railroad with indirect access to provide rail service due to the need to interchange with a second railroad. - Prioritization of traffic between the railroads may not be aligned with the needs of the Port.	- Ongoing coordination between the Port, railroads, and other stakeholders to align resources and seek process optimizations that benefit all parties. - Support strategic investments in infrastructure where operational constraints cannot be overcome.
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4. IDENTIFICATION OF ANY IMPROVEMENTS TO RAIL ACCESS TO THE PORT FACILITIES & RELATED INTERMODAL FACILITIES TO SUPPORT DESIRED TRAIN VOLUMES

Norfolk International Terminals (NIT)

- Marshalling yard tracks may need to be modified to mitigate impacts to NPBL service during assembly of intermodal trains for departure.
- Constructing a grade-separated crossing on Hampton Boulevard at Terminal Boulevard will improve operational flexibility for managing arriving intermodal trains.
- Elimination of the two at-grade crossings into the adjacent residential neighborhood on the NIT arrival tracks along Terminal Boulevard would support arrival of longer trains and more efficient arrival operations.
- Other Sewell's Point Line improvements as needed to mitigate rail traffic congestion (determined by NS).

Portsmouth Marine Terminal (PMT)

- On-dock rail will need to be constructed to suit operational needs of tenant and Port.
- Terminal has heavy lift to rail capabilities that may need to be retained.
- Concepts supporting unit train operations and/or smaller scale industrial operations have been developed. Implementing the unit train concept may requires property from adjacent CSX intermodal yard. Also may displace some Port operations (empty container yard).
- Existing constraints limit east and west rail leads to single track, which could hamper fluid rail operations between tenants.
 - East lead restricted by current tunnel construction activities; constructing additional tracks may be feasible but needs to be evaluated.
 - West lead constrained by Pinner's Point highway interchange support piers. Establishing second track into terminal will require additional property.

4. IDENTIFICATION OF ANY IMPROVEMENTS TO RAIL ACCESS TO THE PORT FACILITIES & RELATED INTERMODAL FACILITIES TO SUPPORT DESIRED TRAIN VOLUMES

Newport News Marine Terminal (NNMT)	• Adjacent CSX rail corridor has minor vertical clearance restrictions that may need to be corrected if justified by a new cargo opportunity (CSX has identified these improvements) • Rehabilitation and improvements to terminal tracks likely necessary to support expansion of rail activity at terminal. • Opportunity to explore more-integrated connection between terminal and near-terminal rail yard if a sufficient cargo operation is identified.
Virginia International Gateway (VIG)	• Terminal has areas to construct expanded intermodal capacity • Constructing additional tracks at Suffolk Marshalling Yard needed to support interchange operations with NS and CSX. • Construction of additional crossovers on CWRY line may provide additional operational flexibility. • Extending the double track segment of the corridor to support fluid movement of rail traffic to/from VIG.
Virginia Inland Port (VIP)	• Additional on-dock tracks may be necessary to support increased volume • May need to evaluate additional on or offsite trackage to deconflict arrival and departure operations with other NS mainline traffic.
Port of Richmond (POR)	• Construct additional rail infrastructure (working and storage tracks) to expand rail capacity (effectively at capacity during peak grain season). • Expansion of off-terminal rail infrastructure to support fluid train movements to the terminal, if justified by cargo volume.

5. IDENTIFICATION OF POTENTIAL INCREASES TO THE PORT FACILITIES' INTERMODAL RAIL THROUGHPUT CAPACITY AS DEMAND INCREASES

Norfolk International Terminals (NIT)	• Rail operations are undergoing optimization efforts to increase capacity using the existing rail infrastructure. • Terminal configuration supports construction of additional working tracks to provide greater rail capacity at the terminal.
Portsmouth Marine Terminal (PMT)	• Current operations focused on over-the-road truck intermodal transportation. • Opportunity to provide intermodal rail service via adjacent CSX intermodal rail yard.
Newport News Marine Terminal (NNMT)	• The Port currently uses NNMT as a general cargo terminal; implementation of significant intermodal operations would necessitate significant infrastructure improvements.
Virginia International Gateway (VIG)	• Terminal configuration supports expansion of intermodal capacity. • Greater capacity of existing facilities may be achievable if/as demand conditions and rail service trend towards more optimal conditions, including CSX double-stack service and more balanced import/export demand.
Virginia Inland Port (VIP)	• VIP's intermodal capacity may be increased through the construction of additional working tracks. • Near-term capacity controlled by frequency of NS service.
Port of Richmond (POR)	• Over-the-road truck intermodal operations use POR as an inland access point to NIT and VIG via barge service. • Intermodal rail operations at POR are not envisioned.

6. SJR69 SPECIFIC ISSUES OF CONCERN

SUMMARY OF MASTER RAIL PLAN FINDINGS

Strategic recommendations to guide future rail planning and funding decisions to support desired train volumes.

Recommendation 1: State planning and investment in rail infrastructure serving The Port should maximize utilization of existing rail and rail-related infrastructure among all parties.

- Designate an existing entity (e.g. OIPI) or create a new entity (e.g. Office of Freight Planning) to facilitate continuous and comprehensive coordination efforts among the Port, railroads, passenger rail, U.S. Customs and Border Protection, and other stakeholders to optimize rail service to the Port through improved alignment of schedules and resources. Similar efforts have been successful at other U.S. ports and in the Virginia I-95 rail corridor.
- The Port should provide regular input to, and collaborate with, this entity to evaluate and establish achievable and sustainable goals for rail intermodal service across the entirety of the Port.
- Focus of these efforts should include identification of critical infrastructure needs that are not readily apparent to any one stakeholder, conducting more accurate benefit/cost assessments, development of analytical tools and supporting data collection to support better decision making, and exploring cost-and risk-sharing opportunities.
- Designated entity should also regularly review public funding programs for rail, port, and highway infrastructure and operations to ensure that operational enhancements, such as use of mechanisms to provide supplemental funding to U.S. Customs and Border Protection operations, receive due consideration in such programs.
- A wide variety of performance expectations, performance incentives, and performance standards have been established as justification for public investment in rail infrastructure. The Commonwealth and the Port should ensure, in a transparent and collaborative fashion, that those expectations, incentives and standards all contribute to the overall goals of The Port and the Commonwealth.

6. SJR69 SPECIFIC ISSUES OF CONCERN	SUMMARY OF MASTER RAIL PLAN FINDINGS
Recommendation 2: Develop policies and/or programs to support local infrastructure planning and investment where rail activity occurs.	• Designate a lead individual or entity to explore programs to assist communities with coordination, planning, and funding of improvements to mitigate rail impacts, including quiet zones, crossing safety improvements, and grade-separated crossings, with short-term emphasis on the Commonwealth Railway corridor and Class I corridors in the vicinity of the CWRV interchange. Similar programs adopted by other states include California's Section 190 Grade Separation Program and North Carolina's Sealed Corridor Project. • Designate a lead individual or entity (e.g. the designated entity in Recommendation 1) to explore program options for ensuring that existing, rail-served industries are not disadvantaged by other rail projects and programs. • Establish a process for the Commonwealth to develop guidelines and metrics for use in prioritizing and justifying community and industrial mitigation efforts.
Recommendation 3: Where opportunities to foster Port-served private industrial activities are present, maximize the value of Port assets by improving coordination of on- and off-terminal development.	• Given the value and scarcity of Port property and the access it provides to deep draft vessels, the Port should evaluate, on a case-by-case basis, the extent to which it accommodates prospective private rail-served industrial operations within its terminal boundaries. If the Port determines an attractive operation cannot be wholly accommodated within a terminal, a lead individual or entity such as VEDP or DRPT should be designated to coordinate roles, responsibilities, and resources among stakeholders to evaluate and develop off-terminal rail facilities that could support realization of the opportunity. • The designated lead individual should use this Master Rail Plan to assist with the identification, coordination, and development of off-terminal needs. • Off-terminal development plans should seek to support other terminal rail activities where feasible and practical to maximize potential use as rail needs evolve over time.

6. SJR69 SPECIFIC ISSUES OF CONCERN	SUMMARY OF MASTER RAIL PLAN FINDINGS
	• Off-terminal rail development plans should preserve the opportunity for competitive dual rail access to the terminal(s) it supports. • Where opportunities to benefit from private development efforts appear to be present, designate a lead individual or entity to establish benchmarks for tracking progress and expected involvement from state agencies, including the Port.
Recommendation 4: The Master Rail Plan identifies off-terminal impacts and constraints as intermodal rail traffic increases at NIT, VIG, PMT, and a future marine terminal. The following efforts will support near-term competitive improvements or community relief for intermodal rail activities, provided that the host railroad accepts the improvements and any associated conditions, and that planned terminal expansions occur as currently planned.	Norfolk International Terminal (NIT) • Double-tracking the rail line between Portlock and NIT would lower operational costs for NS, NPBL, and other railroads that all use the line. • A direct connection between Lambert's Point line used by NPBL and the rail line to NIT once existed; reconstructing it would improve access for CSX trains via NPBL. • Establish storage for a complete unit train (i.e. no breaking) on NPBL system in order to stage longer trains. Virginia International Gateway (VIG) • Commonwealth Railway (CWRY) corridor should be double-tracked along its full length to support increased rail traffic at VIG. • CWRY's Suffolk Marshalling Yard should have two additional tracks constructed (already partially funded by an REF grant). • The interchange between CWRY and the Class I railroads in Suffolk should be evaluated for improvements. Portsmouth Marine Terminal (PMT) • If competitive rail operations are established at PMT, improvements to circumvent the physical constraints of the Pinner's Point interchange could mitigate some potential rail conflicts. This would likely require off-terminal property to construct. • There are likely on-terminal solutions to mitigate rail conflicts on the east lead, once Midtown Tunnel construction is complete, but those will depend on any on-terminal activities or users.

6. SJR69 SPECIFIC ISSUES OF CONCERN	SUMMARY OF MASTER RAIL PLAN FINDINGS
	Newport News Marine Terminal (NNMT) • Engage with CSX to address vertical clearance restrictions on the Peninsula Subdivision that currently limit the height of rail cars (in particular, multi-level automobile carriers) may allow The Port to more effectively compete for automobile cargo and other breakbulk cargo through NNMT. Future Craney Island Marine Terminal (CIMT) • Property for the rail corridor needs to be acquired. • A significantly larger CWRV marshalling yard will be necessary to support CIMT at full build out. Recommend identifying potential sites for this yard. • Improvements will be needed near VIG to allow CIMT traffic to pass while trains arrive at or depart from VIG. • Related commercial issues must be identified and resolved.

Appendix B

Summary of Private Industry Input

During the development of this Master Rail Plan, input from a variety of industry sectors was sought to understand what qualities of rail and port operations are most relevant to industry operations. Discussions further touched on where industries see opportunities to further improve the competitiveness and attractiveness of rail-served operations at The Port of Virginia.

Bulk Commodities

The overarching theme for bulk commodity industries was the strong desire for a responsive supply chain that provided consistent quality of service. Industries involved in importing or exporting bulk commodities, such as soybeans, corn, and other grain products, typically seek to minimize their costs by establishing highly efficient and closely coordinated supply chains to minimize the number of assets needed (e.g. rail cars, track, vessels, and silos). Rail and ship line services further encourage this behavior with rate structures that incentivize rapid turnaround of assets (e.g. 12 – 15 hour unloading windows for trains) and efficient crew use.

Attractive locations for rail-served facilities are those that can accommodate best-in-class operational practices such as the following:

- High-Speed / High-Volume facilities that provide economies of scale and minimize the time transport assets (rail and vessels) are held on site.
- Loop tracks that permit the loading or unloading of rail cars without breaking a unit train into multiple rail car strings and reducing the number of non-productive moves.
- Unrestricted operations, including priority access by rail providers and the opportunity to use onsite locomotives to quickly execute operations on time and with minimal disruption. Typically requires additional tracks to allow other trains to pass.
- Consistent service by the rail provider(s) to support the close coordination of supply chain elements - particularly the ability to meet schedule commitments for arrival, departure, and other railroad-supported activities. This level of service is often impacted by the presence of constrained rail infrastructure (e.g. single track segments) used by multiple rail providers.
- Deep draft port facilities that enable the industry to use modern, larger vessels.

Furthermore, bulk commodity industries generally seek to construct facilities specific to their operational needs. The opportunity to be in immediate proximity to complementary industries can also be desirable.

Due to the low margins associated with bulk commodities, competitive rail pricing generated by facilities having dual rail access is regarded as extremely attractive as well.

Outside the facility, the capacity of the associated local and interstate rail corridors is also a consideration. Bulk commodity unit trains are typically 75 to 95 cars (4,800 – 6,700 L.F.) or more and require equally long passing sidings, local yards, and storage tracks to efficiently travel. This infrastructure also impacts the responsiveness of goods movement to other uncertainties or events occurring within the supply chain, such as vessel schedule changes.

Financial assistance, in the form of subsidies, tax breaks, financing, or other benefits are naturally attractive, but are generally regarded as a secondary consideration to the inherent operational potential of the site when evaluating where to make a capital investment. The level of investment in the common infrastructure serving the broader industrial community by public entities and/or the railroads was regarded as more important.

Transload

Transload operations are those operations that receive containerized cargo and distribute its contents to multiple trailers; or those that receive non-containerized materials and load into containers.

Container to Trailer Transload

Container to trailer transload is typically used by retail customers. Large orders of single products from overseas suppliers via container. It is unlikely that a single store requires a full container of a single product, so the containers are delivered to a distribution center which splits the container cargo between trailers bound for multiple stores. Each trailer delivers multiple products from multiple containers.

Rail service typically provides a link between the port and inland distribution centers. As a critical segment in the supply chain, these operations are price-sensitive but also strongly consider the speed and reliability of the rail service from the port to the distribution centers.

Cargo to Container Transload

Container loading operations provide the opportunity for exporters to reach smaller markets where demand does not warrant (or infrastructure cannot support) bulk delivery. Examples of this include placement of grain from gondola rail cars into containers, containerizing logs and lumber products, and containerizing paper products. These operations typically seek to make use of the empty container inventory generated by imbalance between import and export volumes. Rail service may either provide the means to transport the raw good (e.g. grain cars) or the loaded containers thereafter.

These transload operations typically serve customers from multiple origins with loaded containers headed for multiple destinations, and thus benefit greatly from access to multiple railroads and multiple ship lines.

Other critical elements for site selection includes the following:

- Proximity to marine terminal to minimize (or eliminate, if on-terminal) drayage costs
- Terminal gate capacity (where containers are transported to the terminal via truck)
- Opportunity to load containers above highway weight limits
- Proximity to concentrations of empty containers
- Opportunity to use own labor to load the containers
- Synergies or services that further reduce costs

These services also typically operate with low margins, limiting their opportunity to make significant infrastructure investments.

Break Bulk

Break bulk cargo has been largely replaced by intermodal container operations, but does remain part of selected industry supply chains. In Virginia, this cargo includes paper goods and rubber.

On-dock warehouse facilities are typically sought in support of quickly moving the cargo between the ship and sheltered storage, where transfer to/from box cars or trucks occurs. Rail demand is typically lower and less sensitive to schedules, and thereby can function with less efficient infrastructure than the bulk operations discussed above, particularly. Trains associated with break bulk cargo can typically be accommodated on the shorter yards and sidings prevalent in the Hampton Roads area.

Break bulk operations do not typically use specialized infrastructure and can be viable at facilities that have not been modernized. This allows prospective operations to consider use of less-than-ideal locations, particularly if the leasing costs are low and/or there are subsidies or incentives offered to overcome high land development costs. At The Port of Virginia facilities in particular, the prevailing soil characteristics frequently necessitate use of higher cost foundation structures to support the high working loads sought by break bulk operations.

The primary considerations for evaluating a rail-served facility include the size of the warehouse, including interior bay dimensions, proximity to the wharf, and length of the rail loading dock. Truck traffic is also a large element and similar consideration is given to the truck facilities, such as number of loading docks and ease of access to arterials and highways (often evaluated on the potential number of daily trips a truck could make between the site and local customers).

Dual rail access is preferred again for the competitive price pressure, but also as an opportunity to broaden the customer base via an increased number of inland destinations/origins. Dimensional clearances of the rail corridors are also considered, as the industry has been transitioning to “high cube boxcars” whose heights may exceed the design clearance criteria used by railroads in the past.

Ro-Ro Cargo

Industries with Roll-on / Roll-off cargo, primarily relating to automobile import and exports, generally rely on the railroads and ports to provide the infrastructure necessary to transfer the vehicles between the railcars and vessels. The industries further coordinate with each other to generate economies of scale and convenience through improved utilization of the infrastructure and rail car assets (i.e. in addition to the ramp infrastructure supporting multiple companies, there is effort to balance import and export activity to improve utilization of the vessels and rail cars).

These industries are therefore primarily attracted by other Ro-Ro activity and the opportunities for lower costs from the improved asset utilization described above. Decisions regarding port selection are driven primarily by the chosen rail provider and their connections to ports. Rail service is typically contracted

for relatively short durations (a few years) and then rebid. This arrangement generally diminishes access to incentives offered by states and are only effective if offered to a railroad for use as a pricing advantage.

The infrastructure needed to support Ro-Ro operations generally consists of large storage yards for vehicle staging, and multiple straight working tracks to support loading from the end of the train with portable ramps. For heavy machinery, this typically consists of one or more vehicle ramps to drive cargo onto flatbed rail cars. For automobiles, straight track segments with work areas at either end for mobile loading ramps are needed to allow vehicles to be driven onto the rail cars.

Other Feedback

Other industries providing feedback to this rail plan expressed concern regarding rail congestion within the Richmond area and its impact to both the cost and quality of rail service to industrial activities east and north of the Richmond metropolitan area (e.g. Counties of King William and New Kent). Representatives of these industries believe that improvement of rail service to their facilities would assist them with expanding their operations into international markets via Port of Virginia facilities (or domestically via improved access to imported cargo).

Participating rail-served industries with no specific ties to Port of Virginia facilities indicated that they have encountered level of service issues relating to availability of railroad assets (locomotives).

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Exhibits 55-56

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Exhibit 57

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301 W. Bay Street
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Jacksonville, FL 32202
(904) 633-4547
Telefax (904) 633-4531

Richard M. Hood

Assistant Vice President
Business Unit Services

Sent Via Email; Facsimile & Overnight Mail

April 3, 2009

Mr. David Stinson
President and General Manager
Norfolk and Portsmouth Belt Line Railroad Company
1050 Virginia Avenue
PO Box 7547
Portsmouth, VA 23707

Re: Proposed Purchase of Norfolk and Portsmouth Belt Line Property

Dear Mr. Stinson:

Please be advised that CSX Transportation, Inc. (CSXT) has a continued interest in the acquisition of all land, improvements and trackage owned by the Norfolk and Portsmouth Belt Line Railroad Company (NPBL) known as Port Norfolk Yard containing 23.55 acres, more or less, as shown on the September 7, 2007 Baldwin & Gregg, LTD. Survey, together with the all land, trackage, OTM, and signals, (collectively the "Trackage") situated between the crossing diamond of CSXT's Portsmouth Subdivision and the end of track at Portsmouth Marine Terminal and including NPBL's existing buildings within the described property. The proposed sale area is generally shown on the attached exhibit for your convenient reference.

We are suggesting that a purchase and sale agreement could be structured along the following general terms:

1. A purchase price for the land based upon \$150,000.00 per net usable acre for the property described above, plus an additional consideration for the Trackage based on a mutually acceptable valuation methodology.
2. NPBL and CSXT would enter into an appropriate operating agreement to allow NBL to retain service to existing customers
3. Due Diligence period of one hundred eighty (180) days to allow CSXT to obtain title commitment, environmental assessments, engineering and feasibility studies, etc. to determine the suitability of the property for CSXT's proposed use.
4. Closing shall be subject to the parties obtaining approvals, if any, from the Surface Transportation Board or other governmental body. Costs necessary for said regulatory approval to be shared equally between CSXT and NPBL.
5. Conveyance of the property will be by Special Warranty Deed, prepared by CSXT, with marketable title and free of all leases and encumbrances.

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Mr. David Stinson

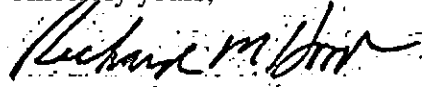
April 3, 2009

Page 2

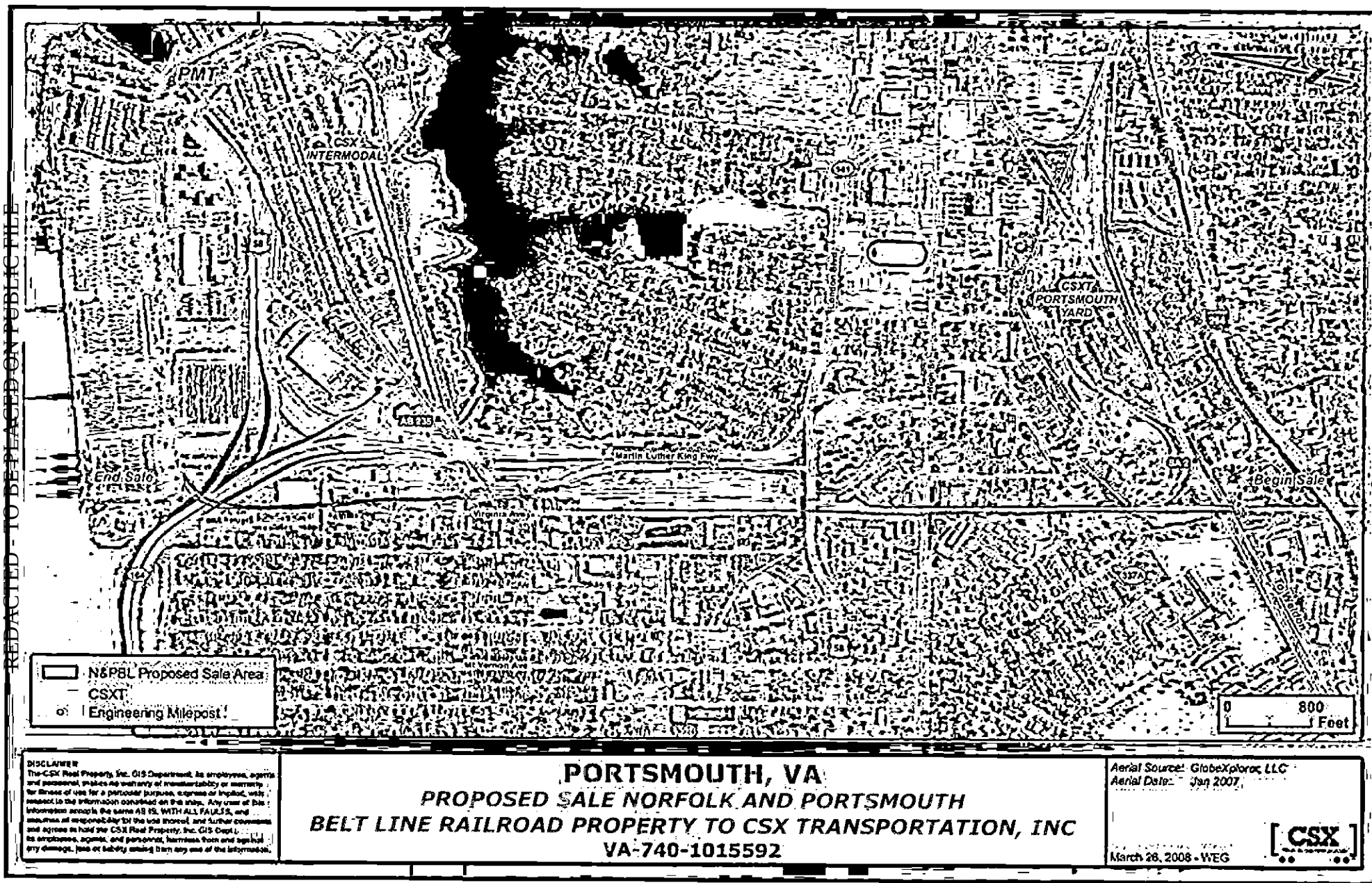
6. Any information relative to surveys, title, environmental studies, and assessments of the buildings or Trackage in the possession of NBPL will be provided to CSXT upon execution of a formal purchase and sale agreement.
7. Taxes, assessments, utilities and rent shall be prorated to the date of closing.
8. Closing shall occur within sixty (60) days following satisfaction or expiration of the due diligence period.
9. Possession shall be at Closing.
10. NPBL shall not market the property, in whole or part, during the duration of negotiations of this proposal or resulting purchase and sale agreement.
11. The transaction contemplated in this letter and the terms and conditions presented in this proposal are subject to CSXT obtaining approval from its Capital Planning Committee and Executive Team.

Thank you for your consideration in this matter and please feel free to call me at anytime if there are any questions or if additional information is desired.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Richard M. Hood", written over a dotted line.

Richard M. Hood



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Exhibit 58

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NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

Docket of Proceedings of Board of Director's
Meeting called to be held in Norfolk, Virginia

Wednesday, December 2, 2009

BOARD MEETING

ITEMS OF ACTION:

1. Approval of minutes of the Board Meeting held on October 5, 2009 and the Board Meeting held on October 26, 2009. (Memorandum and Attachment)
2. Corporate performance projected for year 2009 plus proposed budget for 2010. (Memorandum and Report)
3. Management recommendations for tariff changes. (Memorandum and Attachment)
4. Proposed Capital Expenditure Plan for year 2010. (Memorandum)
5. Proposed salary / merit increase for non-agreement employees for year 2010. (Memorandum)
6. Annual Dividend.

ITEMS OF INFORMATION:

7. Litigation status and update. (Memorandum and Attachment)
8. Safety process update. (Memorandum)
9. Company performance goals for 2010. (Memorandum)
10. Update on Non-Agreement employee status / turnover. (Memorandum)

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ITEM 1 – ACTION

MEMORANDUM

It is recommended that minutes of the October 5, 2009 and October 26, 2009 Board meetings (attached) be approved as recorded.

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ITEM 1 – ACTION

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

Crenshaw, Ware and Martin, PLC,
12th floor conference room 1200
Bank of America Center Norfolk, VA
23510

A special meeting of the Board of Directors was held October 5, 2009 at 10:00 a.m.

PRESENT: Mr. C. H. Allison
Mr. W. Clement
Mr. T. J. Drake
Mr. T. L. Ingram
Mr. M. D. Manion
Mr. D. H. Stinson, Chairman
Mrs. D. N. Coleman

Mr. J. L. Chapman, IV, representing the Company's General Counsel, Steven Armbrust, CSX counsel and Greg Summy, NS counsel, were also present.

There being a quorum, the Chairman called the meeting to order.

The minutes of the April 8, 2009 and September 4, 2009 meetings of the Board of Directors were, on motion duly made and seconded, approved.

Mr. Stinson called for a motion on the sale of the Pinner's Point property proposed at the September 4, 2009 Board of Directors meeting. A motion was duly made and seconded to allow NPBL management to proceed with the sale. After discussion the motion was approved unanimously.

Mr. Stinson presented NPBL management's response to the Memorandum for Recordation presented by Tony L. Ingram and Bill C. Clement at the September 4, 2009 Board meeting, a copy of which is attached to these minutes as Appendix A. Mr. Ingram stated that CSXT would respond to NPBL management prior to the next Board meeting.

In response to an inquiry Mr. Stinson gave a brief update on the progress of the NPBL Rate Committee.

Management was requested to schedule a special meeting of the Board of Directors as soon as possible.

There being no further business, the meeting was adjourned.



Donna N. Coleman
Corporate Secretary

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Norfolk and Portsmouth Belt Line Railroad Company

Management response to Memorandum for Recordation
presented by Tony L. Ingram and Bill C. Clement at
September 4, 2009 Board Meeting

Tony L. Ingram and Bill C. Clement, directors of Norfolk and Portsmouth Belt Line Railroad Company ("NPBL"), representing the interests of CSX Transportation, Inc. ("CSXT"), a shareholder of NPBL, submitted a "Memorandum for Recordation in the Minutes of the Board Meeting" ("CSXT Memorandum") at the meeting of directors of NPBL held on September 4, 2009;

The CSXT Memorandum made certain statements and posed several questions captioned as "Issues for Consideration" and requested an answer to said questions for recording in the minutes of the meeting of the directors;

The CSXT Memorandum was presented in executive session and no officers of NPBL were present during said presentation;

The CSXT Memorandum appears in the opinion of NPBL management to be directed toward those directors of NPBL appointed by Norfolk Southern Corporation ("NS"), as provided in the March 1, 1989 Supplemental Agreement between NS and CSXT, but nonetheless poses certain questions regarding the conduct of the affairs of NPBL by management; and

NPBL management is of the opinion that the factual statements set forth in the CSXT Memorandum regarding the conduct of the affairs of NPBL are incorrect and/or incomplete and offers the following as the response of management.

Response to: "Background"

Management denies that NS has run NPBL as its alter ego. Management has at all times sought to conduct the affairs of NPBL in the best interests of NPBL. Simply because the conduct of the affairs of NPBL might be perceived by either NS or CSXT to not be in their own best interests does not mean that such conduct is not in the best interests of NPBL.

CSXT apparently perceives that it is entitled to special treatment from NPBL because it is a shareholder of NPBL. Management does not conduct the affairs of NPBL to favor one carrier over any other but strives at all times to operate within the parameters of the Agreement dated July 7, 1897 between the carriers that formed NPBL (formerly The Southeastern and Atlantic Railroad Company) for the interchange of their traffic.

Response to: "Issues for Consideration"

All of the issues for consideration posed by the CSXT Memorandum are phrased in inflammatory, accusatory and misleading rhetoric. Nonetheless, management offers its response to each as follows:

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(1) The statement of this issue is based on an incorrect assumption that sale of two parcels of property by NPBL, both approved by the board of directors, will result in the loss of access to either PMT or NIT. Both sales will only be consummated upon the retention by NPBL of either fee simple ownership of the track or deeded easement of trackage rights with express approval by the Surface Transportation Board ("STB"). NPBL will still operate over said track and be entitled to earn switch revenues from such operations.

(2) It is unclear what is meant by "the objections of CSXT board members." The disposition of the property at Port Norfolk (referred to as Pinner's Point) was approved at a duly convened meeting of the directors of NPBL. The offer from the third party was made with the representation that "Rail traffic will present a major source of revenue and volume for the proposed distribution center which would be constructed by Ice Express on the site. Estimated rail boxcar traffic is 18,000 to 21,000m tons by the end of year once the facility is in operation sometime in 2009." (Copy attached.) Such rail traffic would have resulted in additional switch revenue to NPBL. Only one of four tracks would have been sold, permitting NPBL to continue to operate and serve its other customers, including CSXT, over the retained track. Contrary to the implication of the question, CSX Intermodal is not a customer of NPBL.

(3) The offer by CSX Real Property was approximately 20% lower than the offer from Ice Express and came with no representation that the sale would result in additional switch revenue to NPBL. The CSX Real Property offer proposed purchase of the track from the NPBL/CSX diamond at Pinner's Point, which would have eliminated any future payment to NPBL for trackage use by CSXT and virtually eliminated opportunities for NPBL to earn future switch revenue from CSXT for rail traffic carried by NPBL over the track. NPBL management sent correspondence to CSX Real Property advising that the offer was below appraised value on July 17, 2009 (copy attached) to which no response has been received. NS played no role in the decision to notify CSX Real Property that the offer was below appraised value.

(4) The statement of this issue is based on an incorrect assumption that sale of the property at NIT (Sewells Point) by NPBL will result in the loss of access to NIT. The sale will only be consummated upon the retention by NPBL of deeded easement of trackage rights with express approval by the STB. NPBL will still operate over said track and be entitled to earn switch revenues from such operations. It is unclear what concern CSXT has regarding trackage rights with NS since NPBL is the carrier that owns said track. However, NPBL management is unaware of any intention of NS to terminate any existing trackage rights granted to NPBL. The sales price of \$5,100,000 approved by the board of directors is commercially reasonable and the proposed sale will not result in NPBL being foreclosed from accessing NIT. All directors, including those appointed by CSXT and NS, voted unanimously in favor of the sale when presented to the board of directors. Otherwise, NS played no role in the transaction. The sale will protect NPBL's ability to carry traffic over said track by deeded easement of trackage rights with STB approval. It is unclear why CSXT considers any of this to be a "problem" of which VIT needs to be made aware. The property will be sold to the Virginia Port Authority, which owns VIT.

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(5) NPBL management denies that it has engaged in any unauthorized and unwarranted discussions with Perdue regarding CSXT's plans or that it was going to impose any increase in the charges NPBL would bill to Perdue. The only request known to NPBL management by Perdue was made to CSXT, NS and NPBL requesting that certain information be considered by NPBL's rate committee, which has membership from both CSXT and NS. (Copy attached). Whether there was any other communication by Perdue to CSXT or NS regarding freight rates is unknown to NPBL management, but is presumably a matter within the knowledge of the Class I carriers which serve Perdue. (Due to the large volume of Perdue traffic switched by NPBL, there is near daily dialogue and/or correspondence with Perdue on all manner of operational issues.) NPBL switch rates are approved by the board of directors and published by tariff to which Perdue (and any other customers of the Class I carriers) have access. NPBL management has made no assumptions regarding what switch rates may be approved by the board of directors in the future.

(6) NPBL management denies that it has engaged in any unauthorized and unwarranted discussions with any government agencies on any subject. While the statement of the issue does not identify who said what to whom, it appears that this issue is oriented toward discussions between NPBL and the Virginia Department of Rail and Public Transportation ("VDRPT") with respect to funding programs administered by VDRPT for rail preservation and enhancement. Most commonly, communications with VDRPT relate to anticipated future needs and grant applications to obtain funds under these programs. Such communications relate to the normal operation of NPBL and, to the extent that VDRPT indicates that program funds may or will become available requiring the submission of grant applications, then such information is presented to the board of directors to authorize the expenditure of NPBL funds to meet the matching grant requirements of the programs. As grant applications are ordinarily submitted in February of each year, the information is furnished to the directors in advance of the December meeting of the prior year to discuss and, if deemed appropriate, authorize the expenditure to obtain approval to request the matching funds.

(7) NPBL management has endeavored to provide complete and accurate information to all directors on a timely basis regarding matters requiring approval by the board. NPBL management has always acted under the assumption that all directors will have their votes counted and has actively sought to provide any further available information when requested by any director.

(8) NPBL management properly responded to "CSXT's Books and Records" request, which was dated July 23, 2009, the same day as a letter from Mr. Ingram containing several inflammatory and accusatory criticisms of the conduct of management. It was believed that the best interests of NPBL would be served by holding a meeting of the directors, the call for which was initially issued for August 5, 2009. Due to scheduling conflicts, the meeting was eventually held on September 4, 2009. It was at that meeting that Messrs. Ingram and Clement provided clarification and guidance with respect to information sought by them. It took nearly 40 hours of work by management to amass the more than

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1200 pages of documents requested by CSXT, which were then sent to all directors on September 16, 2009. Despite offering to provide any further information or answer questions regarding the information provided, no director has since requested any further information.

Response to: "Immediate Action Requested"

NPBL management does not believe that the company's general counsel, Crenshaw, Ware & Martin, P.L.C. ("Crenshaw firm"), has any conflict of interest that would disqualify the firm from representing the interests of NPBL. Management believes that the Crenshaw firm has diligently, effectively and efficiently represented NPBL in all matters to which it has devoted substantive attention on behalf of NPBL. Having discussed the contents of the CSXT Memorandum with the Crenshaw firm, management confirms that NS has never sought the Crenshaw firm's advice regarding conflicts of interest between NPBL, NS and any other entity regarding any of the issues raised in the CSXT Memorandum.

Response to: "Further Action Requested"

With the exception of action item (7), all of the actions requested in the CSXT Memorandum by CSXT can only be accomplished by a resolution of the directors of NPBL or action by NS. With respect to action item (7), management responds as follows:

(7) The current storage agreement with Perdue, which has been in effect since January 1, 2007, has led to certain operating inefficiencies, including excessive operating costs, without adequately compensating NPBL. Perdue has been given timely notice that the agreement will be cancelled effective December 31, 2009. While management remains open to the prospect of entering into a new storage agreement with Perdue, it must be on terms which are commercially reasonable to NPBL. Otherwise, storage and handling of Perdue's traffic by NPBL will be governed by the published tariff.

Finally, CSXT has requested that NPBL provide a detailed long range business plan and supporting information to allow the shareholders to evaluate NPBL's long term business and financial needs. Management provides to all directors a monthly report of operating performance and financial results, together with an annual report to shareholders. Because NPBL was created by its owners to provide an efficient means of interchanging their traffic and virtually all of NPBL's operating revenue is derived from such switch operations, the amount of traffic, and hence revenue generated, is almost entirely dependent upon the switch services provided to the owning carriers. Unless the owning carriers in the first instance provide to NPBL detailed long range projections of the nature and quantity of rail traffic they will interchange with NPBL, the ability of management to provide a detailed long range plan for NPBL will be a futile exercise. In addition, while the owning carriers have the staff resources to conduct such analysis, NPBL, with only five (5) non-agreement employees, does not have the resources to conduct any such analytical effort. Therefore, it would be necessary to engage outside consultants to perform the analysis and assist in developing a detailed long range business plan. The financial cost of such an engagement is unknown but management is prepared to carry out any directions provided to it by the directors on this subject.

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**CONTINENTAL
REALTY SERVICES**

361 Southport Circle, Suite 200
Virginia Beach, VA 23452

T 757.491.2460
F 757.217.4221

www.contrealty.com

May 5, 2008

Ms. Donna Coleman
Norfolk Portsmouth Belt Line
1050 Virginia Avenue
Portsmouth, Virginia 23707

Re: 21.83 Acre Site @ 1040 Virginia Avenue, Portsmouth, Va.

Donna,

Enclosed for review and action by your corporate authorities, please find a Letter of Intent for the Purchase of the Net Useable Acreage of the Belt Line Property in Portsmouth.

I am submitting the enclosed on behalf of Ice Express whose intention in purchasing the property is to utilize the location as a distribution/transload warehouse facility primarily for the import/export cargo moving the Ports of Virginia. As the prime 3PL provider of service for Eimskip, there are existing contracts in place for import and export ocean cargo worldwide. Rail traffic will present a major source of revenue and volume for the proposed distribution center which would be constructed by Ice Express on the site. Estimated rail boxcar traffic is 18,000 to 21,000 m tons by the end of year one once the facility is in operation sometime in 2009.

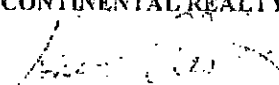
I look forward to working with you to effect the enclosed Letter of Intent and then to proceeding to a formal purchase contract.

Please let me know of any questions as we proceed.

Thank you and regards,

Sincerely,

CONTINENTAL REALTY SERVICES, INC.

By: 
Gregg Christoffersen, CCIM SIOR
Principal Broker

Enclosure

Cc: Bob Gustafson

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NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

1050 Virginia Av.
P. O. Box 7547
Portsmouth, VA 23707
(757) 397-2056

D.H. Stinson
PRESIDENT AND GENERAL MANAGER

July 17, 2009

Mr. Richard M. Hood
Assistant Vice President
Business Unit Services
CSX Real Property
301 W. Bay Street Suite 800, S/C J-915
Jacksonville, Florida 32202

Re: Proposed Purchase of Norfolk and Portsmouth Belt Line Property

Dear Mr. Hood:

This is in response to your letter dated April 3, 2009 regarding the purchase offer of trackage owned by the NPBL known as the Port Norfolk Yard containing 23.55 acres, more or less. Management of the Belt Line had the appraisal of this property recently updated. After carefully reviewing the appraisal, it was determined that the offer received was below market value despite the current economic environment. In addition the terms listed in the offer would require further discussion.

Please feel free to contact me anytime regarding this matter.

Sincerely yours,

David H. Stinson

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Page 1 of 1

Coleman, Donna N.

From: Coleman, Donna N.
Sent: Monday, July 27, 2009 2:23 PM
To: Luebbers, Chris D.; McLemore, Llesl, J.; Cronk, Gregg H.; 'Bennett, Vance'; 'cary_helton@csx.com'; 'john_booth@csx.com'
Cc: Nelson, Diane P.; Stinson, David; Coleman, Donna N.
Subject: FW: Perdue Informational Brief
Attachments: NPB Rate Committee Info0709.docx

All,
NPBL and members of your individual marketing groups received the attached from Perdue with a request that it be presented to the Rate Committee. This can be discussed at our upcoming meeting Wednesday if so desired.
Thanks,
Donna

Donna Coleman
VP, Secretary & Comptroller
Norfolk & Portsmouth Belt Line Rail Road
757-393-2622

From: Clark, Sharon [mailto:Sharon.Clark@Perdue.com]
Sent: Thursday, July 23, 2009 4:48 PM
To: Stinson, David; Coleman, Donna N.; Kraemer, John; Simonc, Pat; tlm_mcnulty@csx.com; Johnson, Bill
Cc: Willey, Dick; Cassidy, John
Subject: Perdue Informational Brief

Good afternoon

Please find attached a informational brief that could be shared at the upcoming NPB Rate Committee meeting regarding, the value an ag Import/export facility brings, Perdue Agribusiness' Chesapeake operation, and potential recommendations to the committee.

We would appreciate everyone's assistance to continue to competitively grow our business.

Please do not hesitate to call with any questions.

Regards,
Sharon

9/9/2009

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July 23, 2009

TO: David Stinson, Donna Coleman – NPB
John Kraemer, Pat Simonc-NS
Tim McNulty, Bill Johnson-CSXT

FROM: Sharon Clark-Perdue AgriBusiness

RE: Information for upcoming NPB Rate Committee meeting

Consider the value of an Agricultural Import/Export Facility on the East Coast:

- Enables NS, CSXT and NPB to participate in the growing world markets for agricultural products
- Provides rail access to imported commodities when supply dislocations result in U.S. product shortfalls
- Enables exports of product from the Mid-Atlantic region, creating a demand 'hole' for Midwest rail to fill
- Gives Eastern railroads a competitive import/export option versus the Gulf or PNW
- Agricultural rail traffic helps support operational assets and fixed costs

Perdue AgriBusiness's Chesapeake import/export facility has a history of growth and is well-positioned to compete and continue to grow:

- Chesapeake is one of two soybean crush plants located on deepwater in the U.S.
- It has been the largest U.S. supplier of wheat to Egypt for the past two of three years and is the largest U.S. supplier of soybeans to Cuba
- In 2009-2010, it will ship as much as 120,000 tons of wheat to Brazil
- Our export volume has increased 324% from 411,000 tons in 2001 to 1,745,100 tons in 2008
- Our container stuffing program has sold over 9,500 TEUS (190,000 tons of product) since 2007
- Perdue has invested more than \$30 million in Chesapeake infrastructure since our purchase in 2000 and is prepared to invest in enhancements for future growth.

Perdue AgriBusiness Overview

- Perdue AgriBusiness (PAB) is among the nation's largest grain companies operating grain storage in excess of 60 million bushels
- Each year, PAB handles more than 250 million bushels of corn, soybeans, wheat and barley.
- PAB works with over 300 independent trucking companies, operates a dedicated fleet of more than 1500 railcars and manages a fleet of 14 barges.

Recommendations for mutual benefit and growth:

- Amend the NPB by-laws and publish a mileage (zone) or commodity based tariff structure.
- Grant NPB management permission to negotiate special storage/switch agreements.
- Extend Perdue's current storage/switching contract for the period of time it takes to complete build out of a 35-car track on-site Perdue and ~15,000 tons ingredient space, provided Perdue provides material proof the projects are proceeding per plan.
- Publish a special tariff item for a competitive switch rate from a storage track to a industrial lead to include a single car and 50 car or more block rate (unit train)

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ITEM 1 – ACTION

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

Crenshaw, Ware and Martin, PLC,
12th floor conference room
1200 Bank of America Center
Norfolk, VA 23510

A special meeting of the Board of Directors was held October 26, 2009 at 2:00 p.m.

PRESENT: Mr. C. H. Allison
Mr. W. Clement (by conference call)
Mr. T. J. Drake (by conference call)
Mr. T. L. Ingram (by conference call)
Mr. M. D. Manion
Mr. D. H. Stinson, Chairman
Mrs. D. N. Coleman

Also present were Mr. J. L. Chapman, IV, representing the Company's General Counsel, Steven Armbrust, CSX counsel (by conference call) and Greg Summy, NS counsel.

There being a quorum, the Chairman called the meeting to order.

The minutes of the October 5, 2009 meeting of the Board of Directors were presented. There was a request that the minutes be amended in regards to the Rate Committee discussion and re-presented to the Board.

Mr. Chapman advised the directors of the October 9, 2009 decision of the Federal Court in favor of the NPBL against the vessel Marlin for damage caused to the fender of the Main Line Bridge.

Mr. Stinson presented NPBL management's recommendations for tariff changes, and the additional recommendations of the NPBL Rate Committee members. During discussion of the recommendations, Mr. Ingram requested that the minutes state that he proposes that a third party be hired to analyze the NPBL financial information and formulate a tariff recommendation, the costs of which would be split by CSXT and Norfolk Southern. No motion was made or action taken on the request.

Following discussion of proposed tariff changes, Mr. Chapman advised the directors of the need to consider the requirements of the Stockholder's Agreement and the By Laws to the extent that either may bear upon any proposed change to the tariff.

There being no further business, the meeting was adjourned.



Donna N. Coleman
Corporate Secretary

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ITEM 2 – ACTION

MEMORANDUM

Attached are the 2009 Projected Revenues and Expenses, 2009 and 2010 Projected Cash Flows, and the 2010 Proposed Budget.

As indicated in the 2009 Projected Revenues / Expenses, revenue cars will be approximately 21,876 which is a 2.2% increase compared to 2008. Net Revenues from Operations are projected to increase \$391,000. Operating Revenues are projected to decrease by 3.2% while Operating Expenses are projected to decrease by 5.3% when compared with 2008.

The increase in operating revenue is primarily related to an increase in grain of 17.3% or 2,160 revenue cars. Other commodities are projected to decrease by 1690 revenue cars.

The decrease in operating expenses is primarily attributable to a \$207,000 decrease in purchased services and rents, a \$187,000 decrease in compensation and benefits and a \$94,000 decrease in fuel. Operating expenses for 2008 were reduced by the reversal of \$350,000 of the personal injury accrual.

Other Income for 2008 included gain on sale of land for \$2,109,050. The gain on sales realized in 2009 is expected to be \$71,768; a reduction of \$2,037,282. Other Income for 2009 includes \$315,000 expected in settlement in the Mainline Bridge litigation. Total Net Income is projected to decrease by approximately \$908,000 or 46.5% over 2008. Income taxes are expected to decrease by \$918,000 or 90.5% over 2008.

The budget for 2010, based on information provided by our existing customers, assumes traffic volumes increase by 5,349 revenue cars from the 2009 projection. This would be a return to the volumes experienced in 2006 and 2007. Demurrage revenues are expected to increase 151% from 2009. Expenses are projected to increase 12% from projected 2009 operating expenses, with the largest increases expected in compensation and benefits, and fuel. Net Income is expected to decrease by \$360,000. The 2010 budget does not include any gain on sales of land and is calculated at the existing tariff. Should recommended tariff changes be approved, switching revenues are projected to increase to \$5,643,750.

Cash and cash equivalents are expected to decrease to approximately \$842,000 in 2009 as a result of a large stockholder dividend declared in 2008 and paid in 2009, a decrease in revenues and a capital expenditure plan encompassing two years of VDRPT grants. Cash and cash equivalents are expected to further decrease to \$371,000 in 2010. The Projected Operating Ratio for 2009 is 88.1% and for 2010 is 90.1%. As of October 31, 2009 the company's Current Ratio was 100.9% and is projected to stay above 100% through year end.

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ITEM 2 – ACTION

Norfolk and Portsmouth Belt Line RR
2009 Projected Revenues/Expenses
(in thousands of dollars)

	<u>2009 Projected</u>	<u>2008 Actual</u>	<u>Incr(Decr)</u>	
			\$	%
Operating Revenues				
Switching	\$4,351	\$4,363	(\$12)	(0.3%)
Demurrage	\$318	\$459	(\$141)	(30.7%)
Total Operating Revenues	\$4,669	\$4,822	(\$153)	(3.2%)
Operating Expenses				
Compensation & Benefits	1,977	\$2,164	(\$187)	(8.6%)
Purchased services and rents	1,518	\$1,725	(\$207)	(12.0%)
Fuel	132	\$226	(\$94)	(41.6%)
Depreciation	157	\$150	\$7	4.7%
Material and other	17	\$80	(\$63)	(78.8%)
Total Operating Expenses	3,801	\$4,345	(\$544)	(12.5%)
Net Revenue (Loss) from Operations	\$868	\$477	\$391	82.0%
Other Income(Expense)				
Other Income	275	\$2,492	(\$2,217)	(89.0%)
Interest Income (expense)	(1)	(\$1)	\$0	0.0%
Total Other Income	274	\$2,491	(\$2,217)	(89.0%)
Net Income (Loss) Before Taxes	\$1,142	\$2,968	(\$1,826)	(61.5%)
Provision for Income Taxes	\$96	\$1,014	(\$918)	(90.5%)
Net Income (Loss)	\$1,046	\$1,954	(\$908)	(46.5%)
Projections Include:				
Revenue Cars Handled				
Grain	14,620	12,460	2,160	17.3%
Aggregate and Cement	2,712	3,700	(988)	(26.7%)
Terminal	2,971	3,589	(618)	(17.2%)
All Other	1,573	1,657	(84)	(5.1%)
Total Revenue Cars	21,876	21,406	470	2.2%
Revenue Cars per T&E Manhour	1.13	1.07		
Avg Staffing Levels				
Non-contract	5	6	(1)	(16.7%)
Scheduled: T & E	14	15	(1)	(6.7%)
Non T & E	9	9	0	0.0%
Total Avg Staff	28	30	(2)	(6.7%)
Cash Balance at end of Period	\$842	\$2,632	(\$1,927)	(73.2%)

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ITEM 2 – ACTION

Norfolk and Portsmouth Belt Line RR
Projected Cash Flows 2009
(in thousands of dollars)

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
	Actual	Actual	Actual	Projected
Beginning Balance	2,632	682	421	363
Add:				
Net Income	115	59	205	1,046
Non-Cash Expenses				
Depreciation	(94)	38	173	42
Deferred Taxes	34	13	77	65
Changes Current Assets/Liab	(85)	54	(331)	(454)
Property/Investing Transactions	151	(393)	(89)	(197)
Pension Plan Funded	(50)	(50)	(47)	(48)
Other Financing Activities	(5)	18	(46)	28
Dividend Paid	(2,016)	0		(3)
Ending Balance	682	421	363	842

Budgeted Cash Flows 2010
(in thousands of dollars)

	1st Qtr	2nd Qtr	3rd Qtr	4th Qtr
	Projected	Projected	Projected	Projected
Beginning Balance	842	812	396	248
Add:				
Net Income	120	34	50	170
Non-Cash Expenses				
Depreciation	37	37	37	37
Deferred Taxes	12	2	16	20
Changes Current Assets/Liab	(100)	(150)	(50)	(10)
Property/Investing Transactions	(50)	(290)	(155)	(45)
Pension Plan Funded	(47)	(47)	(44)	(44)
Other Financing Activities	(2)	(2)	(2)	(2)
Dividend Paid				(3)
Ending Balance	812	396	248	371

2010 cash flows do not reflect proceeds of land sales or recommended tariff changes
See Action Item 4 for Property / Investing Transactions

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ITEM 2 – ACTION

Confidential

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.**STATEMENT OF INCOME****2010 BUDGET**

Railway operating revenues:	
Switching revenues	\$ 4,168,868
Demurrage revenues	<u>800,000</u>
Total railway operating revenues	<u>4,968,868</u>
Railway operating expenses:	
Compensation and benefits	2,369,019
Purchased services and rents	1,542,500
Fuel	167,000
Depreciation	175,000
Material and other	<u>358,550</u>
Total railway operating expenses	<u>4,610,069</u>
Income from railway operations	358,897
Other income (expense):	
Other income net	240,000
Interest expense on debt	<u>(175)</u>
Total other income (expense)	<u>239,825</u>
Income before income taxes	598,722
Provision for income taxes:	
Current inc taxes	175,000
Deferred inc taxes	<u>50,000</u>
Total income taxes	<u>225,000</u>
Net income (loss)	<u>\$ 373,722</u>

11/17/2009

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ITEM 3 - ACTION

Tariff

Management recommends changes to NPBL tariffs as presented at the October 26, 2009 Board of Directors meeting. A summary of changes to the switching tariff is attached along with the recommended tariff (8100-I). No rate changes are proposed for the demurrage/storage tariff, however recommended wording changes are attached in the proposed tariff (6400-A).

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ITEM 3 - ACTION

**NORFOLK & PORTSMOUTH BELT LINE RAILROAD
1050 VIRGINIA AVENUE - P. O. BOX 7547
PORTSMOUTH, VIRGINIA 23707**

QUICK REFERENCE OF NPBL SWITCHING TARIFF 8100-1 EFFECTIVE JANUARY 1, 2010

TYPE OF SERVICE	ITEM	TARIFF RATES	
UNAUTHORIZED APPROPRIATION	105	\$430.00	
HOLD FOR DISPOSITION	110	\$52.00	Cars order to HFD
SET BACK FROM HFD	110	\$220.00	Cars order back to plant or to carrier
INTRA-TERMINAL	120 a	\$331.00	
ON LEASED STORAGE TRACKS	120 b	\$295.00	
MULTIPLE CAR (15 OR MORE)	120 c	\$258.00	
LINE-HAUL	125 a	\$210.00	(was \$243)
LINE-HAUL - IMPORT/EXPORT *	125 b	\$148.50	* Total Switching Charge including switch rate and reclaim
INTER-TERMINAL (CROSS TOWN)	130	\$262.00	
MULTIPLE CAR (15 OR MORE)	130 a	\$205.00	
INTERMEDIATE SWITCHING	135	\$155.00	
WEIGHING			
ON OWN SCALES (intra-plant)	140 a	\$50.00	in addition to regular switching charges
ON OTHER SCALES (intra-terminal)	140 b	\$100.00	in addition to regular switching charges
CARS RECEIVED IN ERROR	150	\$262.00	
LOCOMOTIVES, CRANES, ETC	155	\$264.00	
(ALL MOVES) + COST OF PILOT			
INTRA-PLANT	160 a	\$133.00	
CARRIER RAILS USED	160 b	\$223.00	
SPECIAL SERVICE (PER HOUR)	165	\$350.00	in addition to regular switching charges
SPECIAL TRAIN (8 HOUR CREW)	165	\$3,500.00	in addition to regular switching charges
TURNING (WITHIN INDUSTRY)	170 a	\$133.00	in addition to regular switching charges
(OUTSIDE INDUSTRY)	170 b	\$331.00	in addition to regular switching charges
OTHER THAN ORDINARY EQUIPMENT		\$300.00	in addition to regular switching charges
Changed			
Deleted			
Added			

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ITEM 3 - ACTION

NPB 8100-I
Cancels
NPB 8100-H

**NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY**

TARIFF NPB 8100-I

CANCELS

TARIFF NPB 8100-H

**SWITCHING CHARGES
ALSO
CHARGES FOR MOVEMENT INVOLVING
WEIGHING AND RE-WEIGHING LIGHT OR LOADED CARS
AND
CHARGES FOR SPECIAL SERVICE OF ENGINE AND TRAIN CREW
AT
CHESAPEAKE, NORFOLK AND PORTSMOUTH, VA
AND VICINITY**

ISSUED November 30, 2009

EFFECTIVE January 1, 2010

ISSUED BY

**NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY
P. O. Box 7547
1050 Virginia Avenue
Portsmouth, VA 23707**

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TARIFF NPB 8100-I

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

RULE 1 – Following is list of Railroads connecting with Norfolk and Portsmouth Belt Line Railroad Company:

CSX Transportation, Inc.
Norfolk Southern Railway Company
Bay Coast Railroad

RULE 2 – Switching charges named herein will include the placement of an empty car to be loaded, and return of the same car loaded, or the placement of a loaded car and the return of the same car empty.

RULE 3 – Except as otherwise provided in this Tariff, the rates per loaded car published in this Tariff will also apply on empty cars, new or old, moving on revenue billing.

RULE 4 – Settlement for detoured trains will be made in accordance with rules of Detour Agreement adopted by the Association of American Railroads for Detouring Trains.

RULE 5 – If an empty car is ordered for loading and if the service of switching or placing it has been performed and the car is not loaded for movement over this railroad, the switching charge for a loaded car as shown in Item 120, will be collected from the person, firm or corporation ordering such car. Not applicable in connection with empty cars refused or rejected by shipper account defective or unfit for loading.

RULE 6 – Charges published herein apply to or from sidings and industries served directly by the rails of the Norfolk and Portsmouth Belt Line Railroad Company, also to or from sidings and industries reached by the Norfolk and Portsmouth Belt Line Railroad Company under operating agreements with other railroads.

RULE 7 – DEMURRAGE RATES AND REGULATIONS – All cars handled under this Tariff will be subject to the established car demurrage rules and charges as published in Tariff NPB 6004 Series or successive issues thereof. (See Exception).

EXCEPTION – Where switching service is performed on traffic moving under line-haul rates which are subject to special detention charges and rules, such traffic, loaded in rail cars will be subject to the same detention charges and rules as applicable in connection with line-haul rates.

RULE 8 – APPLICATION OF SHIPMENTS LOADED IN ARTICULATED CARS – When shipments are loaded in so-called articulated cars (two or more car units permanently or temporarily joined together), the switching charges published in this Tariff will apply separately to each unit of the articulated equipment.

For explanation of reference marks, see concluding page of this Tariff.

REDACTED - TO BE PLACED ON PUBLIC FILE

TARIFF NPB 8100-I

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 10 STATION LISTS AND CONDITIONS

This tariff is governed by the Official List of Open and Prepay Stations, ICC OPSL 6000-Series to the extent shown below:

PREPAY REQUIREMENTS AND STATION CONDITIONS

(A) For additions and abandonments of stations, and except as otherwise shown herein, for prepay requirements, changes in names of stations, restrictions as to acceptance or delivery of freight and changes in station facilities. When a station is abandoned as of a date specified in the above named tariff, the rates from and to such station as published in this tariff are inapplicable on and after that date.

GEOGRAPHICAL LIST OF STATIONS

(B) For geographical list of stations referred to in this tariff by station numbers.

STATION NUMBERS:

(C) For the identification of stations when stations are shown or referred to by numbers in this tariff.

ITEM 20 REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.

(A) Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

(B) Where reference is made in this tariff to another tariff by STB Number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic.

ITEM 40 CONSECUTIVE NUMBERS

Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen they will be understood to include both of the numbers shown. If the first number only bears a reference mark, such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

ITEM 75 METHOD OF CANCELLING ITEMS

As this tariff is supplemented, numbered items with letter suffixes will be used in alphabetical sequence starting with A. Example: Item 445-A cancels Item 445, and Item 365-B cancels Item 365-A in a prior supplement, which in turn cancelled Item 365.

ITEM 100 METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number (or letter, or number and letter) being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.

For explanation of reference marks, see concluding page of this Tariff.

REDACTED - TO BE PLACED ON PUBLIC FILE

TARIFF NPB 8100-I

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

**ITEM 105 PENALTY CHARGE FOR UNAUTHORIZED APPROPRIATION OF
RAILROAD-OWNED CARS FOR NON-REVENUE MOVEMENTS**

When a railroad-owned car is appropriated for the non-revenue movement of freight without a specific prior authorization from NPB, a penalty charge of \$430.00 per car per movement will be assessed against the party appropriating such car. Such charge will be in addition to all other charges applicable to such car (See Note 1).

The payment of demurrage, detention, car storage or switching charges does not permit the unauthorized use or additional loading of empty or loaded cars which have been placed by this railroad for loading or unloading (See Note 2).

NOTE 1. This penalty charge does not apply to intraplant movements by other than railroad-owned power which are necessary to facilitate the loading or unloading of railroad-owned cars in connection with immediately prior or subsequent revenue movements, either switching or line-haul.

NOTE 2. Unauthorized use of a railroad-owned car refers to the unauthorized movement of a car by other than railroad-owned power beyond the confines of the industry where car was originally placed by this railroad for loading or unloading.

**ITEM 110 CARS MOVED FROM LOADING TRACKS WITHOUT BILLING AND HELD
ON CARRIER'S HOLD TRACKS AWAITING BILLING INSTRUCTIONS**

Except as otherwise provided for in this Tariff, when on shipper's order, cars are moved by carrier from industry or team tracks without billing and held on carrier's tracks awaiting forwarding instructions as defined in Item 200, Part 10. Tariff NPB 6004-Series, a charge of \$52.00 per car will be assessed against the party responsible for furnishing such forwarding directions and the cars will remain on continuous demurrage or detention (See Note) in the demurrage account of the party in whose name the car was ordered until such forwarding directions are received by carrier's agent. (See Exception).

On car or cars removed from industry or team tracks on shipper's order and held awaiting billing instructions on carrier tracks and such car or cars are ordered back to the original industry or team tracks, the hold for disposition charge of \$52.00 per car will be assessed for switch movement to the hold point on NPBL and a switching charge of \$220.00 per car will be assessed for movement from hold point on NPBL back to original industry or team tracks. Provided that in case move is inter-terminal, the applicable inter-terminal switching charge will apply in each direction in addition to the holding charge of \$52.00. In all cases of hold for disposition, cars will remain on continuous demurrage.

EXCEPTION -- The charge of \$52.00 per car will not apply when carrier's agent receives forwarding directions by noon of the day following performance of the service excluding Saturdays, Sundays and Holidays as defined in Item 200, Part 11, Tariff NPB 6004-Series.

NOTE -- On cars under special detention rules and charges, the same detention rules and charges will be applied as govern in connection with the line-haul rates.

For explanation of reference marks, see concluding page of this Tariff.

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TARIFF NPB 8100-1

**SWITCHING CHARGES OF THE
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

ITEM 120	<u>INTRA-TERMINAL SWITCHING</u>	<u>CHARGE PER CAR</u>
A.	Except as provided in Paragraph B, between industries, sidings or tracks located on or served by Norfolk and Portsmouth Belt Line Railroad Company	(1) \$331.00
B.	Cars switched between private sidings and leased storage tracks served by Norfolk and Portsmouth Belt Line Railroad	(1) \$295.00

ITEM 125	<u>LINE HAUL SWITCHING</u>	<u>CHARGE PER CAR</u>
	Between industries or sidings located on or served by Norfolk and Portsmouth Belt Line Railroad Company and interchange tracks with connecting lines on Shipments originating at or destined to points located beyond yard or switching Limits of connecting lines:	
A.	<u>Applicable on all commodities</u>	(1) \$210.00

ITEM 130	<u>INTER-TERMINAL SWITCHING</u>	<u>CHARGE PER CAR</u>
	Between industries or sidings located on or served by Norfolk and Portsmouth Belt Line Railroad Company and interchange tracks with connecting lines:	\$262.00

ITEM 135	<u>INTERMEDIATE SWITCHING</u>	<u>CHARGE PER CAR</u>
	Between interchange tracks with connecting lines:	
	(a) <u>Applicable on all commodities</u>	\$155.00

For explanation of reference marks, see concluding page of this Tariff.

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TARIFF NPB 8100-I

**SWITCHING CHARGES OF THE
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

**SWITCHING CHARGES, ALSO
CHARGES FOR WEIGHING AND RE-WEIGHING LIGHT AND LOADED CARS
CHARGES FOR SPECIAL SERVICE OF ENGINE AND TRAIN CREW
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

ITEM 140**MOVEMENT INVOLVING WEIGHING**

(See Note A below)

CHARGE PER CAR(A) Weighing cars on private scales located at the industry:

When weighed before placement	\$50.00
When weighed after placement and	\$50.00
For weighing outbound cars loaded or empty before removal from track of industry	\$50.00

(B) Weighing cars on other private scales (See Note B below):

For weighing inbound loaded cars, when so requested before actual, or constructive placement, or loaded outbound cars when so requested before removal from loaded track and	\$100.00
For weighing empty cars, when so requested before placing on loading track or removal from unloading track	\$100.00

NOTE A – Charges shown in this item are for handling of car incidental to weighing and are in addition to switching charges herein for the required handling.
Norfolk and Portsmouth Belt Line Railroad Company does not own or operate track scales.

NOTE B – Those desiring the weighing on private scales must make their own arrangements with the owners of the scales for their use.

ITEM 150

**SWITCHING CHARGE ON CARS RECEIVED IN ERROR
OR NO FORWARDING DIRECTIONS**

CHARGE PER CAR

Cars received by Norfolk and Portsmouth Belt Line Railroad Company, in error or without necessary forwarding directions, will be handled in accordance with AAR Car Service Rule 7.

If cars are returned to the tendering carrier, forwarded to the proper carrier, or require holding, Norfolk and Portsmouth Belt Line Railroad Company may assess the tendering carrier	\$262.00
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For explanation of reference marks, see concluding page of this Tariff

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TARIFF NPB 8100-I

**SWITCHING CHARGES OF THE
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

ITEM 155	<u>LOCOMOTIVES, STEAM SHOVELS, BONDING CARS, DERRICKS ON CRANES, DEAD ON OWN WHEELS LOCOMOTIVES, ON OWN WHEELS, UNDER STEAM IN CHARGE OF PILOT. (See Note)</u>	<u>CHARGE PER CAR</u>
(A).	When handled between interchange tracks with connecting lines	\$264.00
(B).	When handled between interchange tracks with connecting lines and industries or sidings located on or served by Norfolk and Portsmouth Belt Line Railroad Company.....	\$264.00
(C).	When handled between industries or sidings located on or served by Norfolk and Portsmouth Belt Line Railroad Company	\$264.00
NOTE -- Cost of Pilot when furnished by Norfolk and Portsmouth Belt Line Railroad Company will be in addition to the switching charge.		

ITEM 160	<u>INTRA-PLANT SWITCHING</u>	<u>CHARGE PER CAR</u>
(A).	Except as provided in Paragraph B, for switching car between two points on same track or from one track to another track entirely within the confines of the same (single) plant or industry	(1) \$133.00
(B).	For switching car between two points on same track or from one track to another track entirely within the confines of the same (single) plant or industry when use of carrier rails is involved	(1) \$223.00

ITEM 165	<u>SPECIAL SWITCHING SERVICE/SPECIAL TRAIN SERVICE</u>	
(A).	For special switching service of engine and train crew, on request of industry, when regularly assigned on duty switch crew is requested(See Notes	\$350.00 (per hr)
<i>Note 1.</i> Special Switching service is defined as switching other than required by ordinary operating convenience.		
<i>Note 2.</i> Special switching service will be provided subject to the availability of engine and crews and will be provided at the sole discretion of the NPBL.		
<i>Note 3.</i> The charge for special service is per hour with a minimum of 2 hours and will be in addition to published tariff charges for cars switched.		
(B).	For Special Train Service of engine and train crew, outside regular assigned duty, furnished an industry for its use.	\$3,500.00
<i>Note 1.</i> Charge will apply for a minimum of 8 hours or fraction thereof.		
<i>Note 2.</i> An additional charge of \$440.00 per hour or fraction thereof will apply for assignment of engine and crew beyond eight (8) hours, with a maximum of twelve (12) hours for each assignment.		
<i>Note 3.</i> Charge will be computed from the time the crew starts duty at its home terminal until the crew ends duty at its home terminal.		
<i>Note 4.</i> Special Train service will be provided subject to the availability of engine and crews and will be provided at the sole discretion and option of the NPBL.		
<i>Note 5.</i> This charge will be in addition to published tariff charges for cars switched.		
For explanation of reference marks, see concluding page of this Tariff.		

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TARIFF NPB 8100-I

**SWITCHING CHARGES OF THE
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

ITEM 170

**SWITCHING - TURNING OF CARS TO PERMIT LOADING AT STOP-OFF
POINTS OR UNLOADING AT STOP-OFF POINTS OR DESTINATIONS:**

1. In instances where it is desired that freight in carloads be placed on delivery tracks for loading at stop-off points or unloading at stop-off points or destinations from one particular side or end of car, cars must be properly placarded on both sides and notation made on bill of lading and waybill substantially as follows:

NOTICE TO CARRIER

Deliver Car for loading or unloading from door or end specified by placard.

2. On freight in carloads, not properly placarded on both sides of car to load or unload from one particular side or end of car, which shipper or consignee, after initial placement of car directs carrier to turn and return to the same track for loading or unloading from opposite side or end of car, the following shall apply:

CHARGES (See Note 1)

(A) If the car is turned at a "Y" or a turntable within the confines of an industry apply the intra-plant switching charge published in Item 160.

(B) If the car is turned at a "Y" or a turntable within the same switching district, but outside the confines of the industry, apply intra-terminal switching charge published in Item 120.

NOTE I -- If Bill of Lading carries notation that car has been placarded, and placard has disappeared before placement, the charge named herein will not apply.

EXPLANATION OF ABBREVIATIONS

ABBREVIATION**EXPLANATION**

STB -----	Surface Transportation Board.
Noibn-----	The abbreviation "noibn" means that the description of which it is a part applies on articles included in the same "noibn" description in Tariff ICC UFC 6000-Series.
OPSL-----	Official List of Open and Prepay Stations.
RER-----	Railway Equipment Register.
RPS-----	Railroad Publication Service.
STCC-----	Standard Transportation Commodity Code.
Viz-----	Namely.

EXPLANATION OF REFERENCE MARKS

**REFERENCE
MARKS****EXPLANATION**

- A. Increase.
- (1) Where this reference mark is referred to, the rates or charges published for application on intra-plant, intra-terminal, or inter-terminal switching service apply only when loaded in or on ordinary equipment.
- Ordinary Equipment Means:
- Box cars not exceeding 52 feet in length, inside measurement, but not including box cars of any length which are cushioned underframe, insulated or equipped with any type of loading devices or XF cars.
 - Flat cars not exceeding 54 feet in length and having marked capacity not greater than 180,000 pounds; but not including flat cars of any length equipped with racks, frames, bulkheads, tie down devices, hoods, or other appurtenances extending above the deck of the car, nor on special type flat cars with mechanical designations "FD", "FG", "FW", "FM" as listed under the heading of Heavy Capacity and Special Type Flat Cars in Tariff ICC RER 6410-Series.
- (Continued on following page) For explanation of reference marks, see concluding page of this Tariff.

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TARIFF NPB 8100-I

**SWITCHING CHARGES OF THE
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

(Concluded)

EXPLANATION OF REFERENCE MARKS

3. Gondola cars having marked capacity not greater than 190,000 pounds, but not including gondola cars of any length equipped with covers, hoods, containers or cradle floors. (See Exception 2).
4. Open top hopper cars not exceeding 60 feet in length, inside measurement and having marked capacity not exceeding 180,000 pounds.
5. Cars other than described as ordinary equipment in Paragraphs 1 to 4, owned or leased by shipper or consignee.

When shipments that are both loaded and unloaded within the same switching district are loaded in or on cars that are other than ordinary equipment, the charge to apply will be the charge published herein for application to shipments loaded in or on ordinary equipment as described in Paragraphs 1 to 5 above, plus \$300.00 per car for use of other than ordinary equipment (See Exception 1). On joint line movements, the foregoing charge will be assessed only once regardless of the number of carriers used and will be divided \$150.00 per carrier when two carriers are involved, and \$100.00, \$100.00 and \$100.00 per carrier when three carriers perform the switching service. (See Exceptions 2 and 3).

EXCEPTION 1 – These provisions will not apply on shipments of Coal, Coke (the direct product of Coal), or Iron-Ore.

EXCEPTION 2 – These provisions will not apply on shipments of ferrous scrap when in gondola cars having a marked capacity greater than 190,000 pounds when such cars are furnished at carrier's convenience in lieu of ordinary gondola cars ordered by shipper provided that the following certification is made on the shipping document by shipper:

- A. Ordinary gondola cars of 190,000 pounds capacity or less ordered by shipper and car over 190,000 pounds capacity furnished by carrier.
- B. Shipment could have been loaded in size of car ordered.

EXCEPTION 3 – These provisions will not apply on shipments of grain, soybeans, soybean meal, cement fertilizer or fertilizer material in covered hopper cars.

-THE END-

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ITEM 3 - ACTION

NPB 6004-A
Cancels
NPB 6004

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

TARIFF NPB 6004-A

CANCELS

TARIFF NPB 6004

DEMURRAGE RULES AND CHARGES

STORAGE RULES AND CHARGES

Applying at all NPB points in the South Hampton Roads Area

ISSUED November 30, 2009

EFFECTIVE January 1, 2010

Issued By
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
1050 Virginia Avenue
P. O. Box 7547
Portsmouth, VA 23707

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ITEM 5 - APPLICATION OF REFERENCE PUBLICATIONS

The following publications contain rules, regulations, charges and allowances specifically referred to herein or may apply directly or indirectly along with the terms of demurrage, storage etc that is covered in this publication.

AAR 2 - Hazardous Materials Shipping Descriptions (49-series STCC numbers)
 BOE 6000 Bureau of Explosives Rules
 RER 6411 Official Railway Equipment Register
 RPS 6740 Heavy Duty Flat Car Charges
 OPSL 6000 Open and Prepay Station List
 STCC 6001 Standard Transportation Commodity Code
 UFC 6000 Uniform Freight Committee

ITEM 20 - REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.

Where reference is made in this tariff to tariffs, items, notes, rules, etc. such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

ITEM 40 - CONSECUTIVE NUMBER

Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen they will be understood to include both of the numbers shown. If the first number only bears a reference mark such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

ITEM 75 - METHOD OF CANCELLING ITEMS

As this tariff is supplemented, numbered items with letter suffixes will be used in alphabetical sequence starting with A. Example: Item 445-A cancels Item 445, and Item 365-B cancels Item 365-A in a prior supplement, which in turn cancelled Item 365.

ITEM 100 - METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number (or letter, or number and letter) being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective

ITEM 200 - GLOSSARY OF TERMS

FOR THE PURPOSE OF APPLYING PROVISIONS IN THIS PUBLICATION IN THE FOLLOWING ARE DEFINED AND SHALL GOVERN:

- 1. Actual Placement:** - When a car is placed in an accessible position for loading or unloading or at a point designated by consignor or consignee.
- 2. Allowance Days:** - Are days in addition to credits earned for which charges will not be assessed. Car Days are reduced by the number of allowance days.
- 3. Car Days:** - A twenty four (24) hour period or fraction thereof commencing 0001 hours (Local time) after actual or constructive placement until the car is released and available to NPB.
- 4. Closed Gate:** - When a car cannot be placed on consignee's siding at time of arrival due to siding having a locked gate-, door and/or standing instructions not to place any cars unless the consignee first contacts NPB for placement instructions.

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- All cars are constructively placed at time of arrival.
5. **NPB Track:** - All tracks which NPB provides for its own uses and purposes and other tracks located inside of its right-of-way or yards and terminals.
 6. **Consignee:** - The party to whom a shipment is consigned or the party entitled to receive the shipment.
 7. **Consignor:** - The party in whose name cars are ordered.
 8. **Constructive Placement:** - When a car cannot be actually placed because of any condition attributable to the consignor or consignee, such car will be held at an available hold point and notice will be given the consignor or consignee that the car is held awaiting instructions. Car Days will begin if instructions to NPB are not received before 0001 hours (See Car Days), of day following notification.
 9. **Credit Day:** - Non-chargeable day. Credits can only be earned on those cars released from demurrage.
 10. **Electronic Means:** - Any approved electronic device (i.e. approved computer application, e-mail, telephone, facsimile) used to communicate to CYO the disposition of a car.
 11. **Forwarding Instructions:** - A bill of lading or other suitable order given to NPB, containing all of the necessary information to transport the shipment.
 12. **Holidays:** - The following days will be considered NPB Holidays: New Year's Day, Labor Day, President's Day, Thanksgiving Day, Memorial Day, Christmas Day, Independence Day
 13. **Loading:** - The complete or partial loading of a car in conformity with NPB loading and clearance rules, and the furnishing of forwarding instructions.
 14. **Open Gate:** - When a consignee does not place any restrictions (physical or otherwise) on NPB to place cars on their siding upon arrival.
 15. **Private Car:** - A car bearing other than railroad reporting marks and which is not a railroad controlled car.
 16. **Private Track:** - Trackage assigned for individual use including privately owned or leased tracks.
 17. **Public Delivery Track:** - Any accessible track open to the general public for loading or unloading.
 18. **Railroad-Controlled Cars:** - A car provided to NPB directly, by car companies or others, for indiscriminate use by NPB in servicing any of its customers.
 19. **Reload:** - When the same car is completely unloaded and then loaded. Reloading will be expressed (with cars unloading demurrage) from date of tender to date forwarding instructions are received.
 20. **Stopped in Transit:** - When cars are held enroute because of any condition attributable to the consignor or consignee, or owner.
 21. **Tender:** - When NPB gives notification that a car is available for unloading or loading by either actual or constructive placement to consignor or consignee.
 22. **Unloading:** - The complete unloading of a car and notice from the consignee that the car is empty and available to NPB.
 23. **Assignee:** - A shipper who has requested and has been assigned cars to a specific pool of cars for their use.
 24. **Assignee car:** - A car of any ownership specifically requested and assigned to a shipper-From a pool of assignment service cars.
 25. **Free Day:** - A non-chargeable storage day.
 26. **Storage Day:** - A 24 hour period, or part thereof.
 27. **Time:** - Local time is applicable. Time is expressed on the basis of the 24-hour clock. (EXAMPLE: 12:01 AM is expressed as 0001 hours.)

ITEM 300 - NOTIFICATION REQUIREMENTS

1. The following notifications (including by electronic means) will be furnished as indicated:

Cars for Private Tracks

- (a.) Notification of constructive placement on all cars held on NPB tracks due to any condition attributable to consignee or consignor.
- (b.) Delivery of car upon consignee tracks will constitute notification.
- (c.) Delivery upon industrial interchange tracks of consignee or party entitled to receive same, will constitute notification.

Cars for Public Delivery Tracks

Notice of arrival will be given to party entitled to receive notification when car is actually placed.

Cars Stopped In Transit

Notice shall be sent or given to the consignee, consignor or owner ordering the car stopped upon arrival of car at the point of stoppage.

Refused Carload Freight

When advised of refusal of car at destination, notice will be sent or given to consignor or owner

2. Notification information provided:

- (a.) Car Initial and Number
- (b.) If contents transferred enroute. NPB will furnish car initial and number of the original car.

3. Methods and procedures for notification:

(a) Notification may be sent or given:

- (1) In writing by U.S. mail. When claim is made that notice was mailed at a later date or delayed through postal service, the date of mailing shall be determined by the postmark, if no postmark or no date appear, the records of NPB shall govern.
- (2) By personal telephone communication or electronic means. When consignor or consignee utilizes an electronic or mechanical device (either in written, oral or keyed data form) notification left on such device will be considered as having been given to consignor or consignee, as of the date and time transmitted.
- (b) Notice of arrival shall be sent or given: - Upon arrival of cars at destination (notification is given 7 days a week) for all cars held under order notify or other provisions which require surrender of bill of lading or payment of lawful charges.

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ITEM 350 NOTIFICATION TO NPB:

A. When NPB personnel are not on duty to receive forwarding instructions, empty release information other or other disposition, consignor/consignee will have until 0001 hours (See Car Days, item 200) of the next day personnel are on duty to furnish such instructions, and they will be considered as having been furnished at the date and time the instructions could have been furnished.

B. When electronic or mechanical devices are used to furnish notification to NPB, the recorded date and time that instructions are received by NPB designated point of contact will govern.

ITEM 400 - ALLOWANCES PERMISSIBLE FOR RELIEF OF DEMURRAGE CHARGES:

In order to be allowed relief as indicated, a claim must be presented to NPB, in writing, by the last day of the calendar month following the month in which the bill was issued, stating fully the conditions for which relief is claimed.

1. Railroad Error: - If, through railroad error, demurrage charges are assessed demurrage will be adjusted to the amount that would have accrued but for such error. (Run around and bunching of cars will not be considered as a railroad error.)

2. Weather Interference: - When because of earthquakes, tornadoes, hurricanes, floods or heavy snow, the operations of the consignor or consignee are disrupted, the demurrage directly chargeable thereto will be eliminated, provided the disruption exceeds two (2) days in duration.

3. Strike Interference: - When it is impossible to load or unload or receive cars from or make cars available to NPB because of strike interference at the point where the loading or unloading is to be accomplished, demurrage days will be charged for at the rate of \$30.00 per day during the period of strike interference, provided:

(a) The disruption exceeds five (5) days in duration during one calendar month.

(b) The provisions of this item will not apply to: - (1) Cars for unloading when waybills are dated four (4) days after the beginning of strike interference. (2) Cars for loading when ordered after the beginning and prior to the ending of strike interference.

4. Switching Delays:

(a) This allowance will be calculated and deducted from car days for car ordered and all others held under constructive placement when all cars on the patron's siding are empty and available at the time a switch is missed or should have been made. If all cars on the patron's siding are not empty at the time of alleged switching failure, allowance will be for the car so ordered and not placed.

(b) When a car is ordered for placement or delivery and this is not accomplished because non-service, allowance will be given for delay in placement. This allowance will apply to the car ordered placed, when held under constructive placement on NPB tracks.

(c) The allowance day(s) will be deducted from the Car Days for all day(s) after which the placement order was given to, but not including, the day on which the car is actually placed.

(d) For example, if a car is ordered placed on day 3 of the month, but not actually placed until day 5 of the month, day 4 of the month will be an allowance day and not a chargeable demurrage day for that car and all cars held under constructive placement on NPB tracks during that time.

ITEM 450 - CARS AWAITING CUSTOMS INSTRUCTIONS PAYMENT OF DUTIES:

Cars delayed on carriers' tracks longer than forty-eight (48) hours, awaiting completion of customs documentation or payment of duties, will begin to accrue normal demurrage charges.

Item 500 - CARS SUBJECT TO DEMURRAGE**GENERAL APPLICATION**

(A) Applicable at all points on NPB.

(B) The disposition of a car at its point of detention determines the purpose for which the car is held and the rules applicable thereto.

(C) All railroad controlled cars held for or by consignors or consignees for any purpose are subject to demurrage rules and charges in this section, except as follows:

(1) Cars moving under freight rates requiring application of special demurrage rules - When authorized in contracts or other agreements.

(2) Private cars are not subject to demurrage rules.

(3) Cars containing freight refused or unclaimed to be sold by NPB for the time held beyond legal requirements.

(4) Cars assigned to shippers returned to points of assignment under load when material is authorized to be returned without freight charges under provisions of freight publication.

(5) Cars assigned to shippers returned empty to point of assignment while subject to storage rules.

(6) Empty railroad equipment moving on own wheels under transportation charges as freight.

(7) Cars of railroad ownership, leased for storage of commodities, while held on lessee's tracks.

(8) Empty cars placed and not used for loading subject to switching charges, unless rejected and found as unsuitable for loading

ITEM 600 - RULE GOVERNING CARS HELD FOR LOADING:

Loading: - is the complete or partial loading of a car in conformity with NPB loading and clearance rules, including the furnishing of forwarding instructions.

Tender: - The notification, actual or constructive placement of an empty car placed on orders of the consignor.

Release:

(a) On date forwarding instructions are received; when received by U.S. mail, such instructions will be considered received after 0001 hours (See Car Days, Item 200) on date received.

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(b) On empty cars placed on interchange tracks of consignor performing his own switching, time will also continue until cars are returned to an interchange track.

(c) On cars found to be overloaded or improperly loaded while at origin will not be considered released until the load has been adjusted.

Computation:

(a) Car Days will be computed from the first 0001 hours (See Car Days, Item 200) after tender (i) until released with forwarding instructions for Railroad Controlled Cars, or (ii) until placement is made for Private Cars. In the case of Private Cars, the separate calculation for originating storage charge will be computed from the time that the loaded car is pulled and held on railroad controlled tracks by NPB without forwarding instructions to time of receipt of required forwarding instructions.

(b) On cars placed prior to date for which ordered, Car Days will be computed from the first 0001 hours (See Car Days, item 200) after ordered until release.

(c) On empty cars placed, without being ordered, will be considered as having been ordered and actually placed on that day.

Credits:

- (a) Three (3) credits will be earned for each Railroad Controlled car released on which disposition is given.
- (b) Two (2) credits will be earned for each private car under constructive placement.
- (c) Zero (0) credits will be earned for each private car pulled for which forwarding instructions have not been received.
- (d) Zero (0) credits will be earned when an empty private car is actually placed in lieu of being constructively placed.

Calculation: See Demurrage/Storage Calculation Item 950

ITEM 700 - RULES GOVERNING CARS HELD FOR UNLOADING:

Unloading is the complete unloading of a car and advice from consignee to NPB that the car is empty and available or a car has been reloaded and forwarding instructions are received.

Tender: - The notification, actual or constructive placement of each loaded car.

Release:

(a) Date and time that NPB receives advice that the car is empty.

(b) Cars placed on interchange tracks of a consignee doing its own switching, must also be returned to the interchange track for release.

(c) When cars are unloaded by NPB, those cars will be released at the time the request to unload is received by NPB from the consignee.

(d) When the same car is unloaded and reloaded, when forwarding instructions are received.

Computation: Car Days will be computed from the first 0001 hours (See Car Days, Item 200) after tender until release.

Credits:

- (a) Three (3) credits will be earned for each Railroad Controlled car released on which disposition is given.
- (b) Two (2) credits will be earned for each private car under constructive placement.
- (a) One (1) additional credit will be provided when the same car is reloaded.

ITEM 800 - RULE GOVERNING CARS HELD FOR PURPOSES OTHER THAN LOADING OR UNLOADING

Applicable to Cars Held:

- (a) On orders of the consignee.
- (b) While awaiting proper disposition from the consignee.
- (c) As a result of conditions attributable to the consignee.

Disposition: That information, which allows NPB to either tender or release the car from the consignee's account.

Tender: The notification, actual or constructive placement of a loaded car.

Release: Date and time that NPB receives advice that the car is reloaded and on which disposition is given on cars.

Computation: Car Days will be computed from the first 0001 hours (See Car Days, Item 200).

- (a) After tender until release, on cars: (1) Partially unloaded. (2) Reconsigned. (3) Stopped in transit.
- (b) After tender until date of refusal on refused loaded cars (consignee).

Credits: No credit days will be earned for a car that is released.

ITEM 900 - DEMURRAGE/STORAGE PLAN

1. Billing will be tendered on a monthly basis for all cars released during a calendar month.
2. Customers having facilities at separate stations cannot be combined.
3. Credit days and car day charges for cars held for unloading or other purposes will be kept separately from cars held for loading.
4. Credit days earned in one calendar month cannot be carried over to another month.
5. Unless otherwise advised, in writing, demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment.

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6. Customer having two or more facilities at the same station with NPB may combine the accounts into one if requested in writing.
7. All days count including Saturday and Sundays. Seven (7) holidays will not be subject to demurrage (See Holidays, Item 200).

ITEM 950 – DEMURRAGE/STORAGE CALCULATION:

- A. 1. Total car days for all Railroad-Controlled cars will be added. (Car/days are net of holidays (See Holidays, Item 200) and non-service allowance days).
2. Total credits for all Railroad-Controlled cars will be added.
3. If total credits equal or exceed total net car days, demurrage charges will not be assessed.
4. If total net car days exceed the total credits, calculation of charges will be made as follows:
 - (a) Subtract total credit days from total car days to determine chargeable days.
 - (b) The number of chargeable days will be assessed \$60.00 per day.
- B. 1. Total car days for all private cars will be added. (Car/days are net of holidays (See Holidays, Item 200) and non-service allowance days).
2. Total credits for all private cars will be added.
3. If total credits equal or exceed total net car days, storage charges will not be assessed.
4. If total net car days exceed the total credits, calculation of charges will be made as follows:
 - (a) Subtract total credit days from total car days to determine chargeable days.
 - (b) The number of chargeable days will be assessed \$20.00 per day.

ITEM 1000 - STORAGE OF EXPLOSIVES, HAZARDOUS MATERIALS, SUBSTANCES OR WASTES (SUBJECT TO PUBLICATION BOE 6000 - hazardous materials regulations of the department of transportation)

Application: This item applies to cars held on NPB tracks (excluding leased tracks) containing:

- (a) Class A, B or C Explosives, named in Part 172 Commodity List, Publication BOE 6000.
- (b) Hazardous materials, substances, or wastes requiring the use of 4-digit identification number on shipping document, placards or panels, as named in Part 11 Section 172.101, Publication BOE 6000.

Demurrage charges for railroad-controlled cars will be in addition to charges provided in this item and Storage Charges on private cars will be in addition to this item.

Storage Days will Commence: After the date of constructive placement and on each car, two free days are given to the Consignee. Storage days commence from the third day 0001 hours (See Time, Item 200) and continue until the car is ordered placed on private tracks or released.

Storage Plan:

1. Total car days for all hazardous material cars will be added. (Car/days are net of holidays (See Holidays, Item 200) and non-service allowance days).
2. Total credits for all hazardous material cars will be calculated as private cars (Item 700) and added.
3. If total credits equal or exceed total net car days, demurrage charges will not be assessed.
4. If total net car days exceed the total credits, calculation of charges will be made as follows:
 - (a) Subtract total credit days from total car days to determine chargeable days.
 - (b) The number of chargeable days will be assessed \$50.00 per day.

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ITEM 4 - ACTION**MEMORANDUM**

Year 2010 Capital Budget focuses on upgrading the East Fender System for our Mainline Bridge over the Elizabeth River and rehabilitating Bridge #1 located on the Southern Branch. The FY10 plan continues – all of which will be funded in part by Virginia Department of Rail and Public Transportation grants.

Management recommends approval.

PROPOSED 2010 CAPITAL EXPENDITURE PROGRAM

ITEM NO. -----		TOTAL COST -----	VDRPT GRANT -----	NPBL NET COST -----
1.	Industrial Turnout	\$ 30,000		\$ 30,000
2.	Annual NPBL Track Maintenance Program	\$200,000		\$200,000
3.	Rehabilitate the East Fender System on MLB	\$650,000	\$455,000	\$195,000
4.	Rehabilitate Bridge No.1 on Sou. Branch	\$200,000	\$140,000	\$ 60,000
5.	Miscellaneous Discretionary Items	\$ 25,000		\$ 25,000
6.	Replace Company Vehicle	\$ 30,000		\$ 30,000
		=====	=====	=====
	FY10 TOTAL:	\$1,135,000	\$595,000	\$540,000

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ITEM 4 - ACTION**APPROVED 2009 CAPITAL EXPENDITURE PROGRAM**

ITEM NO. -----	BOARD APPROVED -----	ACTUAL COST -----	VDRPT GRANT -----	NPBL NET COST -----
1. Portsmouth Blvd Crossing	\$139,895	\$176,869	\$159,182	\$ 17,687
2. Deep Creek Blvd Crossing	\$109,981	\$123,810	\$111,429	\$ 12,381
3. Berkley Track Maintenance (VDRPT 2009 grant)	\$590,000	\$516,733	\$361,713	\$155,020
4. Berkley Track Maintenance (VDRPT 2008 grant)	\$350,000	\$265,418	\$185,792	\$ 79,626
5. Annual Track Maint Program	\$175,000	\$160,474	\$0	\$160,474 as of 10/31
6. Liberty & Freeman Ave Xings*	\$546,000	\$546,000	\$546,000	\$0
7. Berkley Yard & MLB Maint* (VDRPT 2010 grant)	\$844,846	\$844,846	\$591,392	\$253,454
8. Voice Recorder System (misc. discretionary item)	\$ 25,000	\$ 18,954	\$0	\$ 18,954
	\$2,780,722	\$2,653,104	\$1,955,508	\$697,596

* items to be carried over to 2010

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ITEM 5 – ACTION

MEMORANDUM

The employees of the Belt Line have worked with **Zero** FRA reportable injuries through October 31, 2009. This is a major accomplishment and makes 1,247 consecutive days without a reportable injury. The company continues to fight frivolous litigation against the Belt Line and was given a favorable judgment for the company on an appeal to the Virginia Supreme Court.

The following is a list of major accomplishments through October 31, 2009:

- 1.) Zero FRA reportable injuries.
- 2.) 8% decrease in total derailments (13 in 2008 vs. 12 in 2009).
- 3.) Completed two VRDPT grant projects (FY08 / FY09) safely and under budget.
- 4.) Ratio of revenue cars per man-hour efficiency maintained greater than 1.0 to 1.08.
- 5.) Received approval grant from VRDPT for our FY10 project work for \$844,845.
- 6.) Projected 15.9% increase in income from operations
- 7.) Added three new customers: TransMontaigne Dry Bulk, American Protein, and Reed Minerals

Salary recommendations for Job Performance in calendar year 2009 are provided in the table on the following page. Employee annual performance evaluations will be distributed for your review.

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ITEM 5 – ACTION

Position	Salary Range		Proposed Increase		
	Low Range	High Range	Current Salary	% of New Increase	New Salary
Vice-President Comptroller & Corporate Secretary	\$68,200	\$95,000	\$86,250	4%	\$89,700
Terminal Superintendent	\$68,200	\$95,000	\$85,250	deferred	\$85,250
Treasurer	\$45,000	\$81,000	\$71,700	3%	\$73,850
Trainmaster (vacant)	\$45,000	\$78,000			
Administrative Assistant	\$30,000	\$50,000	\$40,000	3%	\$41,200
Totals			\$283,200	2.4%	\$290,000

Total cost of this 2010 annual compensation package to the company would be \$6,800 in salary increases, representing a \$2.4% merit increase. The one-time job performance bonus recommendations will be presented at the Annual Board / Stockholders meeting held in April 2010.

The President & General Manager's salary is \$87,000.

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ITEM 6 – ACTION

MEMORANDUM

Management recommends a Stockholder dividend of 6% payable as of December 22, 2009 to stockholders of record as of December 15, 2009, in accordance with the stockholder agreement.

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ITEM 7 – INFORMATION

MEMORANDUM

Report by General Counsel James L. Chapman, IV.

Re: Litigation Status

As of this date, there are two unscheduled lawsuits and one attorney's lien that may be scheduled for litigation in 2010.

An appeal was heard on the John Wilson FELA case earlier this year. The verdict on this case was for the plaintiff for \$330,000. The Virginia Supreme Court reversed the decision and sent the case back to trial in Circuit Court that is scheduled for April 12, 2010 in Portsmouth.

The NPBL has filed for an injunction against an adjacent landowner to protect our property rights in Chesapeake, Va.

Zero reportable injuries have been recorded through October 2009.

The company believes that its current reserves are sufficient to provide for settlement with the above cases. The Company's personal injury reserve at this time is \$408,255 with no accrual.

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ITEM 8 – INFORMATION**MEMORANDUM****SAFETY PROCESS UPDATE**

The Company has not had an FRA reportable injury as of October 31, 2009. The Company has gone 1247 days without a reportable injury. So far this year, there have been three non-reportable injuries reported.

The Company has reported two rule violation derailments and one FRA reportable derailment so far in 2009.

The Carrier injury rate based on 132,214 man-hours now stands at 0.00 / 200,000 man-hours for years 2007, 2008 and thru October 2009.

<u>AS OF</u> <u>10/31/2009</u>	<u>DAYS SINCE</u> <u>LAST INJURY</u>	<u>INJURIES</u> <u>THIS YEAR</u>	<u>LAST INJURY</u> <u>OCCURED</u>
M. W. & S.	3,566	0	1/26/2000
Clerks	7,792	0	7/1/1988
Train Service	1,247	0	6/2/2006
Engine Service	2,607	0	9/11/2002

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ITEM 9 – INFORMATION

MEMORANDUM

Listed below are the 2010 company performance goals.

1. Zero FRA reportable injuries
2. Decrease rule violation derailments / incidents by 50%
3. Decrease industry related derailments by 25%
4. Increase efficiency of Revenue Cars / man hour by 10%
5. Reduce operating expense per car below \$200
6. Reduce / eliminate current litigation case load
7. Operating ratio below 100%
8. Current ratio above 100%
9. Addition of one new customer

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ITEM 10 – INFORMATION**MEMORANDUM**

The following list is the non-agreement and clerical employees' projected staffing needs. Management plans to eliminate the clerk position with the implementation of NS revenue accounting systems. IT has assigned a project number (45622EN) for CSX waybills within the TYES system. The recurring transactions billing project is projected for completion in January 2010. Management also plans to fill the vacant Trainmaster position to meet needs of the Company.

NAME	POSITION	AGE DOB	HIRE DATE	YEARS OF SERVICE	PROJ. RET.
VACANT	TRAINMASTER				
L. RODGERS	TERM. SUPT.	59 5/26/50	06/28/71	38	2010
PD NELSON	TREASURER	58 8/14/51	10/05/70	39	2011
G. BAKER	CLERK	59 1/9/50	05/16/68	41	2010
R. SEARS	ADMIN. ASST.	24	07/16/08	16mo.	

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Exhibits 59-64

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Exhibit 65

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From: "Moss, Cannon" </O=NSCORP/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=TKEY7>

To: "'Tony MacDonald (tony_macdonald@csx.com)'" <tony_macdonald@csx.com>

Subject: RE: Request for Operating Window

Date: Thu, 09 Apr 2015 19:03:53 -0000

Importance: Normal

Tony:

You are correct that NS has prevented our movement over to NIT because of operational issues. I have not been advised that they are proprietary. They have not told me that they would not handle our traffic, just that they could not accommodate our traffic at this time because it was outside our normal service window. Last night I was informed by Travis Hill at VIT that there would not be a CSX train running to NIT. At this point, it's the Port who is telling me the train is not going to run. Per your request for a window, NS appears to continue to be having issues so I cannot give you a definitive window because I am reliant on them. I can continue to ask each day as I have over the last few days. I gladly welcome the opportunity to handle your business but I have to run over NS to reach NIT. Thanks,

Cannon Moss

From: MacDonald, Tony [mailto:Tony_MacDonald@csx.com]

Sent: Thursday, April 09, 2015 2:05 PM

To: Moss, Cannon

Subject: [EXTERNAL] Request for Operating Window

Cannon,

This will confirm our calls over the last few days ending with your advice last evening that NPBL is unable to provide an operating window for CSX Train X10008 for movement to NIT over NPBL because NSRR claimed "proprietary operational issues". In order to accommodate the customers on that train, CSX is working on a much less efficient alternative plan for these containers, but our customers will need several more operating windows in the future to reach NIT. You also said that you were concerned that NPBL could not provide future windows, despite having provided a window last week. Please confirm this is correct or if not please provide me with the next available operating window so we can plan accordingly.

Thanks

Tony

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Exhibits 66-70

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Exhibit 71

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From: "Moss, Cannon" </O=NSCORP/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=TKEY7>

To: "MacDonald, Tony" <Tony_MacDonald@csx.com>

Subject: RE: CSX move

Date: Tue, 23 Jun 2015 15:31:42 -0000

Importance: Normal

I'm going to furlough some folks and need to know if this intermodal move is actually going to continue.

From: MacDonald, Tony [mailto:Tony_MacDonald@csx.com]

Sent: Tuesday, June 23, 2015 11:31 AM

To: Moss, Cannon

Subject: [EXTERNAL] RE: CSX move

???

TOUGH DECISIONS?

From: Moss, Cannon [mailto:Cannon.Moss@nscorp.com]

Sent: Tuesday, June 23, 2015 11:04 AM

To: MacDonald, Tony

Subject: CSX move

Tony:

I need to really understand your future requirements for us to run to NIT. I'm going to have to make some tough decisions here and need to truly understand if this move is actually going to continue on or if it doesn't make any sense anymore. Thanks,

Cannon

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Exhibits 72-79

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Exhibit 80

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payroll
 EN - ST \$265.99 ot - \$49.87/hr - \$199.48 mi - 15.65
 CO - ST \$250.38 ot - \$46.95/hr - \$187.80 mi - 15.65
 Crew total \$934.95
 Transportation labor overhead 105.44%
 \$1,920.76

Utility Man = \$514.38

Yardmaster - ST - \$267.68 OT - 50.19/hr \$519.92/day w/overhead

Extra board \$158.37/day - \$325.36/day w/overhead

manpower - \$3,310.42

loco rent - \$300 - (1 reserve) 2 locos - \$600

Fuel \$165/loco/shift - \$247.50/12 hr day

Crew hauler mileage @ .515/mile

JF incremental costs - 8.23 each way = \$617.25 JF Fees

75 wells x \$80 = \$6,000 rev./trip

- \$4,475.17 cost/trip - ideal

1524.83 not including supervisor costs

- 632.00 supervisor 3rd shift

\$892.83

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Annual Costs

\$ 72,037.20 Bridge 5 Operator (monthly bill)

\$ 880.00 Taxes (2% NS annual)

\$ 19,270.32 NS to Carolina Jet (monthly bill)

\$ 92,187.52 fixed costs (2017)

\$ 4.99 / car Carolina - Tidewater

\$ 1.16 / car Tidewater - Coleman

\$ 2.08 / car Coleman - West

\$ 8.23 / car Variable costs - one way

\$ 16.46 / car both waysVolumes - 2014 - 2238 - west at 2017 rates420 - Coleman

2658

2015 - 2986 - west

36 - coleman

3022

2016 - 2120 - west - 11 3794

2017 - 1822 - west - 11 6606

18,000 intermodal = \$1335 (counts as a car movement each way)

Portlock - Beltline Junction - Carolina Junction

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2012
1471.772013
1537.532014
1548.482015
1585.952016
1617.832017
1605.86

19

~~5047~~ ~~573047~~
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2012 - already gave here 2012

2013 - Bridge operator - 5052.82
 Zone 1 - 4.75
 Zone 2 - 1.07
 Zone 3 - 1.91

2014 - Bridge Operator - 5,748.63
 Zone 1 - 4.87
 Zone 2: 1.11
 Zone 3: 1.99

2015 - Bridge operator - 5928.38
 Zone 1: 4.95

2016 - Bridge Operator 6,047.52
 Zone 1: 5.01 Zone 2: 1.15 Zone 3: 2.06
 Zone 2: 1.17 Zone 3: 2.10

2017 - Done

Q

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CSX Transportation, Inc.
500 Water Street, J-801
Jacksonville, Florida 32202
Tel. 904-359-7637
Email: Tony_DiDeo@csx.com

Tony DiDeo
Director Intercarrier Management
Joint Facilities

March 23, 2018

VIA OVERNIGHT MAIL AND ELECTRONIC MAIL

Mr. Cannon Moss
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

\$ 7.23 / car each way
\$ 6,003 bridge operator/mo
\$ 8,000 / yr property tax
\$ 1,600 / mo Port lock

Re: Rate Proposal for Long Term Rail Service to NIT

Dear Sir and Madam:

By this letter, CSX Transportation (CSXT) requests that NPBL management adopt the following proposal for long term rail intermodal service to Norfolk International Terminals (NIT), as described in detail below, and as consistent with the NPBL's purpose and interests.

A few years ago, NPBL handled several intermodal trains during a period of near historical shipping container congestion at the ports in Virginia and along the east coast. From those movements alone, we confirmed that consistently operating trains to NIT for CSXT is possible. During that short-lived crunch, CSXT was able to justify the extremely high cost of moving those trains via NPBL at its general tariff rate only because the Virginia Port Authority (VPA) and our customers were desperate to clear the backlog caused by the

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unexpected container surge, and our drayage providers were completely overwhelmed. In other words, we had no other practical choice at the time.

The NPBL's general tariff rate, however, remains prohibitive for normal movements of shipping containers to and from NIT. NPBL has not handled a single intermodal train for CSXT since that period of extreme congestion (nor did it move any intermodal trains to NIT for CSXT prior to that time). This is principally because NPBL's unduly high rates, as well as operational constraints on its service to NIT that should not have existed, and in all events are avoidable or remediable, have made use of NPBL to move containers to or from NIT economically non-viable, or even effectively impossible.

We have been studying this issue closely, however, and remain confident that a rate package promptly can be negotiated and agreed-to that would provide the NPBL with a consistent, long term stream of additional income that could improve its financial position and sustain it into the future, while also being sufficiently reasonable that NPBL could attract sufficient additional traffic to support the rates profitably. In fact, we estimate the service for CSXT we are proposing will generate for NPBL approximately \$1,440,000 in incremental revenue and potentially \$660,000 in incremental operating income in the first year of service alone (estimates based on NPBL's 2016 Annual Report).

The following is a proposal of terms which can serve as the foundation for a definitive rail transportation agreement. We are open to discussion on all points, and welcome your input throughout the process, though we want to move this to conclusion swiftly and see no reason it cannot be.

Background

On July 19, 2010, CSXT provided NPBL management with a formal rate proposal and operating plan (enclosed), which was the product of months of review with NPBL management and Virginia International Terminals (VIT). In particular, NPBL management provided financial and costing information that allowed CSXT to tailor its proposal in a manner that would have provided consistent additional operating income to the NPBL and would have been mutually beneficial for NPBL and CSXT. We expect much of the work and learning from that extensive review process is still relevant and useable, and can be replicated or updated to expedite development of a new mutually-beneficial arrangement. Similarly, we believe the commercial sensitivity and depth of historical information on hand would obviate the need for convening another rate committee, but we are willing to work again through this approach if necessary.

With respect to the operating plan, we are pleased to report that senior officers of CSXT have already met with VPA officers to discuss our objective. The VPA was very supportive of our plans and have committed to assisting us with this important endeavor. Thus, much like the rate committee, we expect any discussions with VIT regarding operations will be productive and can be arranged in short order.

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Summary of Proposed Rates and Contractual Terms

The past two decades have demonstrated that the NPBL general tariff charge of \$210 per car (or per unit, in the case of articulated cars) remains an economic barrier for the NPBL to handle intermodal freight. This charge, whether absorbed by CSXT or passed through to the customer, is simply not competitive for any lane on our network and beyond. Although the NPBL's tariff history demonstrates that the NPBL has often published different switch charges for different commodities, we are aware of NPBL managements' past statements that it was not willing to offer different rates based on commodities. Similarly, we understand the NPBL has faced challenges from its Board and/or the other shareholder with respect to private contracts. More specifically, some Board members in the past have argued that an amendment to the NPBL bylaws would be required to permit the NPBL to enter into private freight contracts (even though the NPBL enters into private contracts for other services, such as locomotive leases, contractor services, etc.), and to allow use of non-NPBL owned or leased locomotives for movements over NPBL trackage. After reviewing case law and Virginia code extensively, we are not convinced this is an accurate interpretation of NPBL's bylaws or the law, generally. Nevertheless, we believe that we will be able to reach agreement on a long term transportation agreement that will be sufficiently beneficial to NPBL such that no reasonable person could refuse to take whatever action is necessary to allow NPBL to enter into such a contract, even if it would involve using locomotive power provided by CSXT or another company. By doing so, we might also be able to lay the groundwork for similar rates and services to be provided by NPBL for NS to reach Portsmouth Marine Terminal (PMT) going forward.

Even at an income-neutral level, we think aspects of how the NPBL operates need to be updated for it to remain viable and competitive, and able to fulfill its charter. Port traffic in Norfolk and Portsmouth is continuing to increase, and NIT is undergoing a radical expansion thanks in large part to a capital infusion of hundreds of millions of taxpayer dollars. If ever there was a time to demonstrate the NPBL's commitment to serve its shareholders and the community that supports it financially, and provide intermodal service to NIT, it is now. Failure to seize this opportunity virtually begs VPA to configure NIT in a manner that would effectively preclude NPBL from continuing to provide even nominal rail service to NIT.

Rate:

We propose \$80 per car (i.e., each articulated section of an articulated car), for loaded or empty cars, moved to or from NIT for the purpose of handling international containers. We think this rate will be sufficiently competitive to attract incremental rail intermodal freight to NIT, while allowing NPBL to earn additional revenue of \$1,440,000, annually, based on the initial level of volume we describe below.

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Volume:

CSXT proposes a minimum annual volume guarantee, with mutually agreed conditions, of moving 18,000 cars (i.e., each articulated section), loaded or empty, moving to or from NIT, on the NPBL per contract year. We are open to a gradual ramp up of volumes in the first years, to allow for less volume in the initial years, progressing (or even exceeding) the proposed volumes in this proposal letter. Finally, we are willing to negotiate mutually-suitable minimum and/or maximum train sizes (on a per car basis).

Shortfall Fee:

CSXT proposes a shortfall fee of \$60 per car, based on a minimum volume commitment of 18,000 cars per year. Standard defenses or exceptions (e.g., force majeure) would apply.

Days of Service:

We have modeled our proposal based on 5 days per week service, consistent with the days of operation at NIT, in order to take advantage of the efficiency and safety benefits provided by fixed crew assignments. Over time, we would be interested in up to 7 days per week service (with a corresponding increase in guaranteed minimum volume), and are willing to consider a graduated "ramp up" to 7 days in the earlier stages of this service. We understand we will both need to consider labor costs, among other things, and are willing to work with you to maximize productivity.

Start Date and Term:

CSXT is ready, willing and able to commence service today. That said, we would be open to a commencement date within 30 days of the execution and delivery of the mutually agreed contract. With respect to the term of any agreement, CSXT is willing to negotiate a reasonable fixed term, including conditions for renewal, all to be mutually agreed.

Locomotives and Fuel:

CSXT is willing to provide NPBL with the locomotives and fuel to handle movement of CSXT traffic at no charge to NPBL. We understand there has been an objection to using CSXT power in the past, even though CSXT and NS locomotives operate on NPBL property every day. As noted above, we think we can reach a mutually agreed arrangement that is sufficiently attractive to motivate appropriate corporate action (if any is necessary) to remove any obstacles. Nevertheless, we are also willing to work with NPBL to adjust the

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rates and operating plan to account for use of NPBL power and fuel, at least to the extent and for so long as any corporate formality actually requires NPBL to do so.

Regardless of which locomotives are used for the move, we would defer to NPBL's stated preference or requirements with respect to the minimum locomotive power (i.e., Horsepower per Ton Ratio).

Interchange Location, Time of Handoff, and Maximum Train Length:

Here again, we would defer to the NPBL with respect to the interchange location, and are open to designation of multiple interchange locations (e.g., Berkley Yard and Portsmouth Yard) to be determined by the parties prior to each interchange event. Rates would remain the same, regardless of interchange location. Similarly, we are willing to work with you to determine operating windows for the exchange of interchange cars. We understand that, at least initially, the windows may vary on a weekly (if not daily) basis.

Documentation:

The foregoing terms would be subject to and become binding only upon memorialization in a mutually agreed written format (rail transportation contract or equivalent) duly signed for both NPBL and CSXT.

Economic Impact on the NPBL

Based on CSXT's internal projections of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost to NPBL, we estimate this proposal would provide the NPBL with a minimum of \$660,000 of additional annual operating income (and an operating ratio for the service equal to 54%) starting in the first full year of operations. That would represent a substantial increase over 2016 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment from CSXT to move 18,000 cars per year. Given the estimated operating ratio NPBL would enjoy from this service, and CSXT's expectation that volumes will only grow once the parties can demonstrate consistent service, we believe this proposal could be a significant element of NPBL's long term strategy in Norfolk.

Operating Plan

The requested services is for "drop and swap" intermodal single-stack or double-stack unit train service between Berkley Yard (or Portsmouth Yard) and NIT. We intend to

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work with you to minimize direct expenses to the NPBL, to work with VIT to integrate with existing and planned operations inside the gate at NIT. We also recognize the need to work with NS to integrate with their operating needs, and we believe it is imperative for all parties to work together in order for NPBL to honor its longstanding obligation to provide service to its owners, to enjoy the use of its trackage rights, and to fulfill the purpose of its retained trackage rights from the sale of its property outside of NIT to the VPA in 2010.

We also note that the NPBL management endorsed the operating plan detailed in the July 19, 2010 rate proposal, and we are willing to work from that operating plan with such adjustments as may be deemed necessary to address any bona fide concerns raised by NS or VIT.

Summary

During the eight years since CSXT's last proposal for long term rail intermodal service, CSXT has had no choice but to dray over one hundred thousand containers that easily could have been handled by the NPBL. Under the current proposal, and based solely on a minimum volume, the NPBL could earn at least \$11 million in revenue and over \$5 million in incremental operating income over the same period. As NIT continues work on its massive expansion project, nearly doubling its present throughput, the projected earnings from this proposal could increase tremendously.

As stated above, we are fully committed to work with the NPBL to address any concerns regarding the requested service and any other terms of this proposal. Given the opportunity presented by this proposal, and the downside if we must continue to rely on drayage, there can be no doubt that time is of the essence for both parties. To that end, we respectfully request a written response to this proposal no later than **April 2nd**.

We look forward to working with you on this important project.

Sincerely,



Tony DiDeo

(Enclosure – July 19, 2010 Rate Proposal and Operating/Financial Plan)

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July 19, 2010 Rate Proposal & Operating/Financial Plan

[Please see attached]

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500 Water Street, J315
Jacksonville, FL 32202
(904) 359-3486
John_Booth@csx.com

J.N. Booth, III
Director Joint Facilities

July 19, 2010

VIA ELECTRONIC MAIL

Mr. David Stinson
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Re: **Rail Service Connection to NIT – Rate Proposal and Operating/Financial Plan**

Dear Sir and Madam:

We refer to CSXT's October 15, 2009 rate proposal, which was rejected by the NPBL because it did not include a detailed operating plan and estimated financial impact on the NPBL. To address the NPBL's concerns, CSXT has consulted with the NPBL and Virginia International Terminals, Inc. (VIT) on the following operating plan, and has further examined relevant financial information, including information provided to the 2009 NPBL Rate Committee.

CSXT is now pleased to offer the following rate proposal, together with an operating plan and related financial information. As detailed below, and assuming NPBL elects to use CSXT locomotives at no charge, this rate proposal will provide the NPBL with at least \$149,452 in risk-free incremental operating income in the first calendar year of operations alone.

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Operating Plan

This operating plan is for intermodal single-stack unit train service between Berkley Yard and Norfolk International Terminals (NIT). In addition to minimizing direct expenses to the NPBL, this operating plan is designed to integrate with existing and planned operations inside the gate at NIT.

At the onset, CSXT requests a drop & swap service three days per week, whereby the NPBL would complete services at NIT between 00:00 and 05:00 on Sunday, Tuesday, and Thursday. For your convenience, Annex A to this letter proposal provides a visual overview of the rail movements in the operating plan described below:

- First, CSXT will deliver a locomotive, including sufficient fuel for the round-trip to NIT, and cars to Berkley Yard, by 18:00 on the preceding day.
- Between 18:00 and 21:00 on the days of CSXT's delivery to Berkley Yard, the NPBL will access NSRR tracks starting at NS Jct., as permitted by agreements between NPBL, NSRR and their respective predecessors dated: July 26, 1917, July 27, 1917, December 31, 1985 and January 1, 2008.
- At Port Lock Yard, the NPBL will pull into an available track, as designated by the NSRR Yard Master. At this time, the NPBL crew will cut away from the front of this consist, run around to the tail, and reconnect. NPBL will perform required brake testing prior to departing. At this point, the NPBL will be staged and waiting for the NSRR Yardmaster to grant permission for movement to NIT.
- After departure from Port Lock Yard, the NPBL will arrive at NIT during the scheduled window from 00:00 to 05:00. As the NPBL advances the 8 miles to QM Jct. (crossing the right leg of the switch), it will proceed past West Jct. onto the NPBL trackage, known as Sewells Point Yard. Here, the crew will set off the consist onto the passing track near Hampton Blvd. and North Gate Road.
- The NPBL crew will then contact VIT for instructions relative to any outbound CSXT containers to be pulled from NIT.
 - If there is an outbound consist to be picked up at NIT, the NPBL crew will advance to NIT and retrieve the consist from the pickup track designated by VIT.
 - The consist will already have been inspected and air tested by TTX, at no cost to the NPBL.
 - The NPBL crew will backtrack over the same route returning to Berkley Yard for CSXT pick up between 13:00 and 17:00 same day.
 - If there is no outbound consist to be picked up at NIT, the NPBL crew would return the locomotive to Berkley during that same window.

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Please note the following, which was incorporated into this operating plan:

- The NPBL management has expressed confidence that the proposed round-trip schedule can be completed efficiently with one scheduled crew start.
- This operating plan assumes the NPBL will use CSXT's locomotive between Berkley and NIT without cost or requirement to refuel.
 - This accommodation will not only simplify operations for these moves, it will enhance NPBL's profitability as noted in the first table below. If NPBL elects to use its own power, the calculations shown in Table 2 will apply.

Rates and Contractual Terms

In order for the NPBL to secure port-related traffic at NIT, its rates and operating requirements must be competitive. Presently, the NPBL's switch rate of \$ 210 per car is an economic barrier that prevents CSXT from being able to move any meaningful port freight by rail at NIT.

Here's why: under Item 125 of its public tariff, the Commonwealth Railway charges \$35.61 per container (empty or loaded) for a similar movement from APM Terminals. The difference between switch charges is considerable, and will only make the NPBL's rate less competitive now that VIT can shift traffic to APM Terminals in its discretion.

CSXT is not interested in placing the full burden on the NPBL to close this gap. Our proposed operating plan, which provides substantial risk-free incremental operating income, demonstrates our willingness to make accommodations to help the NPBL in this effort.

Accordingly, CSXT proposes the following, all to be memorialized in a formal agreement:

- One-way rate of \$37.50 per container (empty or loaded) for a term of three years on movements handled by the NPBL between Berkley Yard and NIT. For operational convenience as necessary, the parties may mutually agree to interchange at Portsmouth Yard for the same rate.
- To minimize financial risk to the NPBL, CSXT commits to provide a minimum average volume (measured over each six month period during the term) of 50 containers per scheduled NPBL round-trip. Assuming three days per week service, the NPBL would have a consistent revenue stream of \$146,250 for 3,900 containers for that six month period.
- In consideration of CSXT's commitment, CSXT may request that scheduled service days be adjusted upon CSXT's prior written request. Also upon prior written request, CSXT may request double-stack service at the same rate per container.

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These adjustments, with allowance for proper notice, would give both parties adequate time to respond to changing market conditions.

- **The NPBL's standard settlement and credit terms would apply to the covered traffic, with any potential container shortfall payment to be remitted in a reasonable time after each six month period.**
- **Mutually acceptable measures and standards of service, including incentives related thereto, would be incorporated into a formal agreement.**

Economic Impact on the NPBL

As shown below in Table 1, based on CSXT's internal analysis of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost, this proposal would provide the NPBL with a minimum of \$149,452 of additional annual operating income starting in the first full year of operations. That would represent an increase of 25% over 2009 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment of 50 containers. For example, if CSXT tenders 80 containers per round-trip (the "Project Volume"), the NPBL's incremental operating income would be \$296,872 over the first full year of operations. This modest increase in volume is not an unreasonable projection, and yet it would represent almost a 50% increase to 2009 operating income.

[TABLES FOLLOW ON NEXT PAGE]

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Table 1

	W/ CSXT Locomotives & Fuel	
	Base Level	CSXT Projected
Avg. Containers Per Train (Scheduled Crew)	50	80
Annual		
Container Volume	7,800	12,480-
NPBL Revenue	\$292,500	\$468,000
Compensation & Benefits	\$96,248	\$96,248
Locomotive Expense	\$0	\$0
Fuel	\$0	\$0
Incremental Maintenance	\$46,800	\$74,880
Direct Expense*	\$143,048	\$171,128
Operating Income Impact	\$149,452	\$296,872
* Extrapolated from 2009 Rate Committee Meeting Package		

Table 2

	W/ NPBL Locomotives & Fuel	
	Base Level	CSXT Projected
Avg. Containers Per Train (Scheduled Crew)	50	80
Annual		
Container Volume	7,800	12,480
NPBL Revenue	\$292,500	\$468,000
Compensation & Benefits	\$96,248	\$96,248
Locomotive Expense	\$10,714	\$10,714
Fuel	\$19,000	\$19,000
Incremental Maintenance	\$46,800	\$74,880
Direct Expense*	\$172,762	\$200,842
Operating Income Impact	\$119,738	\$267,158
* Extrapolated from 2009 Rate Committee Meeting Package		

Note to Table 2: As noted above, CSXT's operating and financial plan contemplates the NPBL's use of CSXT locomotives and fuel at no charge. However, should the NPBL wish to use its own locomotives and fuel, Table 2 provides an estimate of the economic impact to the NPBL, which remains quite favorable.

If the NPBL elects not to use CSXT's locomotives and fuel, the NPBL would still make \$119,738 in incremental operating income at the base-line volume commitment level in the first year of operations. And, using the Projected Volume, the NPBL would generate \$267,158 of incremental operating income, which would represent an increase of approximately 45% over 2009 total operating income for the NPBL.

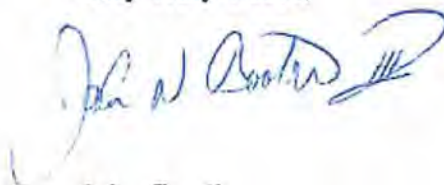
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Summary

CSXT reaffirms its belief that time is of the essence for the NPBL to consider this proposal, which is designed to enable both parties to attract intermodal port traffic at NIT. The outlined operating plan and projected financial gains respond to the NPBL's earlier concerns and provide the justification necessary for the NPBL management to support this endeavor.

CSXT also believes this proposal enables the NPBL to deliver on the commitments it has made, directly and indirectly, to the citizens of the Commonwealth, to create competitive dual rail service at NIT. We hope you agree and respectfully request a favorable response from you within thirty (30) days of this letter.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "John W. Booth", with a stylized flourish at the end.

John Booth

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Operating Plan Support Maps**CSXT → Berkley Yard → NSRR Port Lock Yard****NSRR Port Lock Yard → NIT****Norfolk International Terminals**

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Coleman, Donna

From: Moss, Cannon
Sent: Tuesday, May 15, 2018 8:11 AM
To: Coleman, Donna
Subject: a few things

Donna:

When you have some time will you look into a few things.

- 1) What we are currently paying NS annually for tyes and oss support.
- 2) In follow up to that, if we do switch over to GE, does that save us any money with IT services or anything like that?
- 3) We need to go back 10 years and look what we have paid NS on a per car basis to run up to NIT. Can you get me that information?.

Thanks,

Cannon

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NORFOLK SOUTHERN RAILWAY COMPANY
 MISCELLANEOUS BILLING
 110 FRANKLIN ROAD
 ROANOKE VA 24042-0034



NORFOLK & PORTSMOUTH BELT LINE
 1340 TRUXTON STREET
 CHESAPEAKE VA 23324-1325

Invoice

Invoice Number	90074324
Date	April 25, 2013
Reference Number	J03047
Sales Order	17463

For questions, please contact:
 Wanda Centers
 Telephone: 540-524-5134
 Email: WANDA.CENTERS@NSCORP.
 COM

LOCATION: PORTSMOUTH, VA
 FOR RENTAL, MAINTENANCE AND OPERATION OF INTERLOCKING PLANT AND JOINT TRACKS FROM CAROLINA
 JUNCTION TO WEST JUNCTION.
 AGREEMENT DATED JULY 31, 1994
 JF3047 -- J70253 - ZONE1; J70071 - ZONE2; J70252 - ZONE3; J70254 - ZONE4.

JRW
 JF 03047
 J70071 - J70252 - J70253 - J70254
 SO#17463

Service Period(s): March 2013

Item	Item Detail			
51	Material: M&O Carolina/Tdwtr Zone 1 -- Mar 2013			
	Quantity: 180 EA			
	Prices: Unit Price	4.75 USD per 1	EA	855.00
52	Material: M&O Tdwtr/Coleman Zone 2--Mar 2013			
	Quantity: 126 EA			
	Prices: Unit Price	1.07 USD per 1	EA	134.82
53	Material: M&O Coleman/West Zone 3 -- Mar 2013			
	Quantity: 126 EA			
	Prices: Unit Price	1.91 USD per 1	EA	240.66
54	Material: Operator's Bridge 5/7 Zone 4 -- Mar 2013			
	Quantity: 1 EA			
	Prices: Unit Price	5,502.82 USD per 1	EA	5,502.82
Items total:				6,733.30
Final amount:				\$6,733.30

54622000

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NORFOLK SOUTHERN RAILWAY COMPANY
MISCELLANEOUS BILLING
110 FRANKLIN ROAD
ROANOKE VA 24042-0034



Document 90074324

Date April 25, 2013

Page 2 of 2

PLEASE PAY THIS AMOUNT

Please Detach and Remit with Payment

NORFOLK & PORTSMOUTH BELT LINE
1340 TRUXTON STREET
CHESAPEAKE VA 23324-1325

Invoice Number	Invoice Date	Customer
90074324	April 25, 2013	112397

PAYMENT DUE BY MAY 25, 2013**AMOUNT DUE \$6,733.30****Remit To:**

NORFOLK SOUTHERN CORPORATION
P.O. BOX 116944
ATLANTA GA 30368-6944

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CONSOLIDATED BILLING GROUP J03047

New JF Number: J70071 - J70252 - J70253 - J70254
 NS JF No.: 3047 **NPB**
 Subledger: 3047
 Location: Norfolk, VA
 Description: M & O between Carolina Jct. & West Jct.
 Escalation Date: 07/01/2011

(mm/yyyy)
SERVICE PERIOD: Feb 2012

M&O Carolina/Tdwtr - Per car	ZONE 1	COUNTS		BILLABLE AMOUNT
Rate effective July 1	J70253	426	<u>\$4.66 Per Car</u>	\$1,985.16
M&O Tidwtr/Coleman - Per car	ZONE 2			
Rate effective July 1	J70071	350	<u>\$1.03 Per Car</u>	\$360.50
M&O Coleman/West - Per car	ZONE 3			
Rate effective July 1	J70252	350	<u>\$1.85 Per Car</u>	\$647.50
Operator's Bridge 5/7 Monthly Flate Rate	ZONE 4			
Rate effective July 1	J70254		<u>\$5,330.49 Monthly</u>	\$5,330.49
			<u>Billing Reminder on J70071</u>	<u>\$8,323.65</u>

4/20/2012

G:\Miscellaneous Billing\Joint Facilities\JF 3047 - J70071\JF 3047 Monthly Consolidated Billing Group Calculation.xls

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Exhibits 81-83

Filed Under Seal

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Exhibit 84

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Moss, Cannon

From: Moss, Cannon
Sent: Thursday, April 5, 2018 3:00 PM
To: 'DiDeo, Tony'
Subject: RE: Rate Proposal for Long Term Rail Service to NIT

Tony:

Thank you for taking the time to talk with me about the CSX rate proposal. I had an opportunity to meet with VIT this morning and wanted to pass along the following thoughts regarding the proposal you sent.

- The operating plan outlined in the 2010 letter gives us a good starting point for the operation. The major factor in play are the windows NS would provide for NPBL to make our run to NIT. Once we have those windows we can build our plan around them.
- The 2010 plan would require two crews. I wasn't part of NPBL when this was discussed but looking at the times discussed, you would need two crews. If we formulated a similar plan, two crews would be required.
- Interchange location would be Berkley yard. The starting maximum length of the train would be 4,000ft. based on space available at Berkley Yard. NPBL does not have any location to hold a 4,000 ft. train so the inbound/outbound trains will need to yarded before departure.
- Because of the time sensitive nature of intermodal traffic we would require two locomotives for this move. This is to prevent any delay due to engine failure. Under our current bylaws NPBL power is required.
- In order to facilitate this move, NPBL will need to hire 9 additional employees to perform this service. Once hired the training time is approximately 5 months which will need to be a factor when considering a start date.
- NPBL management has reviewed the proposed rate and would recommend to the board for a rate committee to do a complete review of the tariff.

Please let me know if you have any questions,

Regards,
Cannon Moss

From: DiDeo, Tony [mailto:Tony_DiDeo@csx.com]
Sent: Friday, March 23, 2018 11:45 AM
To: Moss, Cannon <Cannon.Moss@nscorp.com>; Coleman, Donna <Donna.Coleman@nscorp.com>
Subject: [EXTERNAL] Rate Proposal for Long Term Rail Service to NIT

Please see the attached rail service proposal from CSXT.

Thanks,

Tony DiDeo

Anthony DiDeo | CSX Transportation

Director Intercarrier Management || Office (904) 359-7637 || E-mail Tony_DiDeo@csx.com

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Exhibits 85-86

Filed Under Seal

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Exhibit 87

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Page 1

1 IN THE UNITED STATES DISTRICT COURT FOR THE
 2 EASTERN DISTRICT OF VIRGINIA
 3 NORFOLK DIVISION

- - - -

4 CSX TRANSPORTATION, INC.,) Civil Action No.
 5 individually and on behalf) 2:18-cv-530-MSD-LRL
 6 of NORFOLK & PORTSMOUTH)
 7 BELT LINE RAILROAD)
 8 COMPANY,)

9 Plaintiff,)

10 - vs -)

11 NORFOLK SOUTHERN RAILWAY)
 12 COMPANY, et al.,)

13 Defendants.)

- - - -

14 DEPOSITION OF: PHILIP MERILLI

- - - -

15 DATE: March 2, 2020
 16 Monday, 10:04 a.m.

17
 18 TAKEN BY: Plaintiff CSX
 19 Transportation, Inc.

20 LOCATION: McGuire Woods, LLP
 21 Tower Two-Sixty
 22 260 Forbes Avenue
 23 Suite 1800
 24 Pittsburgh, PA 15222

25 REPORTED BY: Tammie Elias, RPR
 Notary Public
 No. TE71367

Job No. CS3984173

1 Q. Was the discussions that you had with
2 Mr. Summy about the April 6, 2018 letter part
3 of the same discussions with respect to the
4 earlier rate proposal from CSX?

5 MR. MULLINS: I'd just caution the
6 witness that's a yes or no question. Content
7 of communication.

8 A. Yes.

9 BY MR. MCFARLAND:

10 Q. Did you at any point seek the counsel of any
11 attorney other than one who was employed by
12 Norfolk Southern with respect to your
13 involvement as a board member of NPBL and
14 Mr. Armbrust's letter of April 6, 2018?

15 A. No.

16 Q. As a board member of the Belt Line, did the
17 board sometimes review and approve contracts
18 that the NPBL entered into?

19 A. None that I recall besides -- no, none that I
20 recall.

21 Q. Were there any of Mr. Armbrust's proposed
22 actions found on pages 6387 and 6388 that you
23 agreed with as a board member of the NPBL?

24 A. Yes.

25 Q. And which ones?

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Page 58

1 A. C and D, if they were not already in place.

2 Q. And do you know if during your remaining
3 tenure on the board, there was any
4 implementation of the actions outlined in C
5 and D?

6 A. As a board member, it never came up in a board
7 meeting.

8 Q. So I think if this letter is dated April 6,
9 2018, my recollection is there was a board
10 meeting on April 18th of 2018, and you're
11 indicating that nothing came as to
12 implementation of the items in C and D at that
13 April 18th, 2018 board meeting; correct?

14 A. Correct.

15 Q. And then I believe there was another board
16 meeting in December of 2018, the exact date of
17 which I think we'll come across in a little
18 bit, but am I correct that to the best of your
19 recollection, there was no implementation of
20 the items in C and D at the December 2018
21 board meeting?

22 A. Correct.

23 Q. And would that have been your last board
24 meeting?

25 A. No. I made -- I was at the April 2019

1 Belt Line used were, in fact, leased from
2 Norfolk Southern?

3 A. Actually I did not.

4 MR. CHAPMAN: Object to the form of
5 that question.

6 BY MR. McFARLAND:

7 Q. Do you recall any discussion of the items in
8 the bullet points on Merilli 15 at any of the
9 board meetings you attended?

10 A. Not that I remember, no.

11 Q. The last bullet point references that "NPBL
12 management has reviewed the proposed rate and
13 would recommend to the board for a rate
14 committee to do a complete review of the
15 tariff."

16 Do you know if there was ever -- if
17 the recommendation here from NPBL management
18 was ever followed by the board?

19 A. Without looking at the minutes, I don't
20 remember it coming up at a board meeting. I
21 don't remember that.

22 MR. McFARLAND: My next exhibit is
23 the document found at tab 23, bates number
24 NPBL 006232 through 636.

25 - - - -

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Exhibit 88

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Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CSX TRANSPORTATION, INC.,
individually and on behalf

of NORFOLK & PORTSMOUTH
BELT LINE RAILROAD
COMPANY,

CIVIL ACTION
FILE NO.

2:18-cv-530-MSD-LRL

Plaintiffs,

vs.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,

Defendants.

~~~~~

DEPOSITION OF  
JERRY HALL

9:03 a.m.

February 21, 2020

600 Peachtree Street  
Suite 3000  
Atlanta, Georgia

Susan M. Pitts, CCR-B-1806, RPR

Job No. CS3990713

Veritext Legal Solutions

1           A.     I can't say for sure because I didn't  
2 really get into rates as -- in my position.

3           Q.     During your service on the board, did CSX  
4 propose any -- CSX representatives propose any  
5 changes in the structure of the board?

6           A.     Only by correspondence, letter. It wasn't  
7 in a board meeting. But I do recall the  
8 correspondence requesting that.

9           MR. MCFARLAND: Okay. In that respect, if  
10 you will give the witness tab -- the documents  
11 at Tab 9. And this is Bates Numbered  
12 CSXT0006383 through 6390.

13           MR. ERBACH: This will be Exhibit 7?

14           THE REPORTER: Yes.

15           (Exhibit 7 was marked for identification.)

16           THE WITNESS: I have reviewed and I am  
17 familiar with this.

18           Q.     (By Mr. McFarland) Do you remember  
19 receiving a copy of this back in April of 2018?

20           A.     Yes, I do.

21           Q.     And had you had any dealings with  
22 Mr. Armbrust at CSX before receipt of this letter?

23           A.     No. I do not know him.

24           Q.     Okay. What did you, as a member of the  
25 NPBL board, understand this letter to be addressing

1 or discussing?

2 A. Requesting a change of the makeup of the  
3 board of NPBL.

4 Q. Did you, as a board member, take any  
5 actions with respect to this letter?

6 A. No, I did not.

7 Q. Were there any special board meetings  
8 called to address or discuss this letter?

9 A. No.

10 Q. At the time you concluded your service on  
11 the NPBL board, what was the status of the request  
12 made in this letter?

13 MR. ERBACH: Object to form.

14 THE WITNESS: I'm not sure if it was an  
15 official response back from Cannon Moss. There  
16 probably was, but I can't say for sure without  
17 reviewing all the documents. There was no  
18 change in the makeup of the board, though.

19 Q. (By Mr. McFarland) Do you know if any  
20 committees were formed or called to investigate the  
21 issues raised in Mr. Armbrust's letter?

22 A. No, not to my knowledge.

23 Q. As a member of the NPBL board, what were  
24 your feelings on the appointment of independent  
25 directors to the NPBL board?

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# Exhibit 89

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Page 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

CSX TRANSPORTATION, INC.,  
individually and on behalf  
of NORFOLK & PORTSMOUTH CIVIL ACTION  
BELT LINE RAILROAD FILE NO.  
COMPANY, 2:18-cv-530-MSD-LRL  
Plaintiffs,  
vs.  
NORFOLK SOUTHERN RAILWAY  
COMPANY, et al.,

Defendants.

~~~~~

DEPOSITION OF
THOMAS HURLBUT
1:00 p.m.
February 21, 2020

600 Peachtree Street
Suite 3000
Atlanta, Georgia

Susan M. Pitts, CCR-B-1806, RPR

Job No. CS3990713

Veritext Legal Solutions

1 document before today?

2 A. The -- I'm not sure if I have. It's
3 the -- some of the -- reading it today, some of it
4 sounds familiar, but I cannot tell you if that's
5 because I saw the document or because Cannon spoke
6 about it at a board meeting.

7 Q. Do you recall if you had any discussions
8 with Mr. Moss before April 5th, 2018 about the
9 contents of his e-mail to Mr. DiDeo?

10 A. I did not.

11 Q. Other than receiving the e-mail and
12 whatever was discussed at a board meeting, did you
13 have any discussions with Mr. Moss about this -- his
14 response?

15 A. Other than receiving e-mails from Cannon
16 Moss, yeah, I don't know that I received this e-mail.
17 So apart from e-mails from Cannon and items on a
18 board docket, I did not have any discussion outside a
19 board meeting about this.

20 Q. Did you ever discuss the CSX rate proposal
21 with anyone at Norfolk Southern?

22 A. No.

23 Q. The very last bullet point, Mr. Moss
24 writes: NPBL management has reviewed the proposed
25 rate and would recommend to the board for a rate

1 committee to do a complete review of the tariff.

2 From your -- well, the next board meeting,
3 I think, was April 28th, maybe? Well, I'm sorry, let
4 me be specific. April 18th of 2018. Do you know if
5 that was discussed at the April 18th, 2018 board
6 meeting, conducting a tariff review or having a
7 committee do it?

8 A. I do not recall anything being presented
9 to the board for their -- as an action item. I am
10 not sure if anyone mentioned a rate committee at the
11 meeting.

12 Q. Then is it fair to say to the best of your
13 recollection, the board did not vote to form a rate
14 review committee?

15 A. To my recollection, the board did not vote
16 to form a rate committee.

17 Q. At the conclusion of the April 18th, 2018
18 board meeting, if there was a rate committee, is it
19 fair to say you were not on it?

20 A. I can tell you I've never served on a rate
21 committee.

22 MR. McFARLAND: Next one, folks on the
23 line, is NSR00076482.

24 (Exhibit 15 was marked for identification.)

25 Q. (By Mr. McFarland) Do you recognize the

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Exhibit 90

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Exhibit 91

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Page 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

No. 2:18cv530

CSX TRANSPORTATION, INC.,
individually and on behalf
of NORFOLK & PORTSMOUTH BELT
LINE RAILROAD COMPANY,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
et al.,
Defendants.

Remote Proceedings

January 13, 2021

9:38 a.m. - 6:40 p.m.

VIDEO DEPOSITION OF ROBERT GIRARDOT
(via Teleconference)

Taken before SUZANNE VITALE, R.P.R., F.P.R.
and Notary Public for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the
above cause.

Job No. CS4395739

Veritext Legal Solutions

1 believe it would also include -- there is a per-car
2 trackage rights fee that NPBL has to pay to
3 Norfolk Southern. And so that would be included in
4 that cost because that would be -- so those would be
5 the two incremental costs.

6 And, again, these are estimates. I think
7 they're good estimates.

8 Q. In setting a rate, CSXT considers its own
9 costs in delivering the service, right?

10 A. We -- on this particular one, we would
11 consider what it costs us to do business with the
12 NPBL, yes.

13 Q. I'm speaking more generally.

14 As a general matter, in setting a rate,
15 CSXT would consider its own costs in delivering a
16 service, right?

17 A. That's one consideration, yes.

18 Q. So would you agree, then, setting a rate,
19 the railroad should consider its variable costs in
20 setting that rate?

21 MR. HATCH: Objection, calls for opinion,
22 and vague.

23 THE WITNESS: I think -- you know, I just
24 said one of the things we would consider would
25 be costs. And, you know, one component of cost

1 is variable cost.

2 BY MR. WINGFIELD:

3 Q. Given the objection, let's go through it a
4 little bit.

5 So you have an MBA, right?

6 A. I don't understand.

7 Q. You have a degree, master's of business
8 administration from a significant school, correct?

9 A. I have an MBA, yes.

10 Q. And as part of obtaining the MBA, you
11 would have studied costs, right?

12 A. Yes. Yes, I did.

13 Q. And in your history as an employee of
14 CSXT, you've been involved extensively in examining
15 costs as they affect rates, right?

16 A. You know -- I mean, rates are determined
17 by the market, right? So when you determine
18 whether, you know, you could make money or not, you
19 compare the market, which is the rate, to what your
20 costs are.

21 Q. All right. In the world of costs, you
22 just testified that it's appropriate to look at
23 variable costs involving delivering a service.

24 What about fixed costs, is it appropriate
25 to look at your fixed costs in determining what a

1 rate should be for service?

2 A. In some cases, it is. Other cases, it's
3 not.

4 Q. Isn't it true that a company's fixed costs
5 are real costs, and if they're not covered in the
6 long run, that the company won't make money and
7 could fail, right?

8 MR. HATCH: I'm going to object that it
9 calls for an opinion.

10 And, you know, it would be helpful --
11 these are generalized questions. I'm not sure
12 which of the topics that they relate to.

13 Alan, if you've got a particular one you
14 think it relates to, I'd welcome the
15 identification.

16 MR. WINGFIELD: Okay. This examination
17 relates to topic number 8 in the deposition
18 notice, which relates to the 2018 service
19 proposal and the considerations weighed in
20 formulating the proposal.

21 So now he's testified that NPBL's costs
22 were weighed in consideration of formulating
23 the proposal, so I want to explore this topic.

24 MR. HATCH: I think, respectfully, you can
25 ask him what, from your topic, considerations

1 CSX took into account in formulating the 2018
2 proposal.

3 But these are hypothetical, general
4 questions about how businesses operate. And I
5 don't think they're tied to that.

6 So if you can tie it to that, Alan, I
7 think that would be helpful.

8 BY MR. WINGFIELD:

9 Q. Mr. Girardot, did CSX include, as a
10 calculation of the \$780,000 incremental cost number
11 and the \$660,000 incremental operating income
12 number, consideration of NPBL's fixed costs?

13 A. You'd have to get more specific on fixed
14 costs. I mean, there's some -- tell me which fixed
15 costs, and then I can --

16 Q. How about depreciation of assets?

17 A. I don't -- well, I don't think that that's
18 one that we would have looked at because this
19 business wouldn't have changed any of their
20 depreciation schedules.

21 Q. NPBL owns tracks, correct?

22 A. That's correct.

23 Q. And NPBL owns locomotives -- excuse me --
24 strike that.

25 NPBL owns certain ancillary equipment to

1 be used for conducting its business, right?

2 A. That's correct.

3 Q. And it has ancillary buildings and office
4 space that it maintains for conducting its business,
5 right?

6 A. Yeah, that's correct. But we didn't see
7 that how us running a train out to NIT would cause
8 them to increase or decrease those items that you
9 just mentioned.

10 Q. If there's no money in your proposal to
11 cover these fixed costs, then where is the money
12 supposed to come from to operate NPBL's business, to
13 cover these fixed costs in the long run?

14 A. Well, first of all, there was going to be
15 \$660,000 left over of this that they could
16 contribute towards having it -- you know, up until
17 this point, Mr. Wingfield, is -- fixed costs was
18 being covered by the current level of business that
19 they handled, all right? So we were bringing
20 incremental business, as we state here.

21 So all of that fixed cost was already
22 being covered. So this new business would actually
23 give them more coverage of those existing fixed
24 costs.

25 Q. So your suggestion is that the \$660,000

1 incremental operating income could, in part, be used
2 to cover NPBL's fixed costs?

3 A. That's really an accounting question on
4 how they decide to treat that incremental revenue.

5 Q. Would it have been fair for NPBL to
6 consider its fixed costs in assessing the 2018 rate
7 proposal?

8 MR. HATCH: Objection, calls for opinion
9 and vague.

10 THE WITNESS: I was going to say I don't
11 know what "fair" means, but I think -- I'll try
12 and answer specifically.

13 Would it be a good business decision for
14 them to -- it would only be a good business
15 decision for them to consider any incremental
16 fixed costs that this operation might generate.

17 BY MR. WINGFIELD:

18 Q. And that's because, in your view, its
19 existing business would already be generating money
20 to cover its fixed costs?

21 A. Well, I mean, the day before we made this
22 proposal -- is all of NPBL's fixed costs was being
23 covered by the existing business, and we didn't see
24 any significant new fixed costs that this would
25 generate. And so this would be -- this would be

1 incremental operating income, as we state there.

2 How you account -- you know, how an
3 accountant would classify that is something I can't
4 answer.

5 Q. Is it true that a railroad that owns a
6 track using ties would have a regular maintenance
7 program to repair and replace the ties?

8 MR. HATCH: I'm going to object again. I
9 mean, this is a generic hypothetical question.
10 I don't think it's covered by any of the
11 topics.

12 MR. WINGFIELD: Let's focus on NPBL.

13 BY MR. WINGFIELD:

14 Q. NPBL owns track with ties, right?

15 A. Yes.

16 Q. And you would expect NPBL to have a
17 regular maintenance program to repair and replace
18 the ties on a regular, reasonable schedule?

19 Wouldn't you expect that?

20 A. Well, it depends on how you define, you
21 know, "a reasonable schedule."

22 I mean, like, I mean, can you be more
23 specific?

24 Q. Well, just as a general proposition, based
25 on your knowledge of how railroads operate, wouldn't

1 Were you personally -- are you personally
2 privy to any of those conversations, if any, that
3 occurred between NPBL and any of its customers,
4 shippers, others who pay you money about its rates?

5 A. Are you asking me in my personal capacity
6 or my capacity as the CSX representative?

7 Q. Well, I'll ask you first in your personal
8 capacity.

9 A. No, I'm not aware of it because in my
10 personal capacity, I deal with the intermodal
11 traffic, international intermodal traffic.

12 Q. Is your answer different in your capacity
13 as CSX representative?

14 A. Yes.

15 Q. So what do you know about NPBL's
16 communications with customers other than CSX,
17 shippers, customers, however you want to phrase it,
18 people paying money for services, about NPBL's
19 rates?

20 A. Well, I mean, I think the thing that
21 sticks out is the biggest carload customer on NPBL
22 is -- is it Perdue? It's a grain customer.

23 Q. I believe it's Perdue.

24 A. In the process of preparing for this, I
25 saw some NPBL communications about the terms of

1 service at Perdue where they were asking for
2 improved economies.

3 Q. As experienced railroad executives,
4 Mr. Girardot, wouldn't you think it would be likely
5 that Perdue would come to NPBL and ask to get the
6 same rate that CSX was getting?

7 A. No, not at all.

8 MR. HATCH: That is both hypothetical and
9 unless you correct me, well outside any of the
10 30(b)(6) categories. So I'd object on those
11 grounds.

12 THE WITNESS: Would you like me to answer
13 that?

14 MR. HATCH: If you can.

15 THE WITNESS: Yeah. I think Perdue
16 knows -- because they use tariffs on other
17 shortline railroads, so they have different
18 rates for intermodal traffic and carload
19 traffic. Perdue does business in all kinds of
20 places.

21 And so they know that that's apples and
22 oranges. So that would not create an
23 expectation with them to ask for lower rates.

24 BY MR. WINGFIELD:

25 Q. Is it your testimony, on behalf of CSXT,

1 that NPBL faced near-zero risk, that if NPBL gave
2 CSXT a lower rate, that would result in
3 cannibalization of revenues from existing customers?

4 MR. HATCH: Objection, hypothetical.

5 THE WITNESS: Yeah, well, there are no
6 existing intermodal customers on the NPBL, so a
7 specific term for intermodal traffic --

8 (Reporter clarification.)

9 THE WITNESS: The question is zero risk,
10 you know, and, you know, the term I used was
11 "near-zero risk." There's nothing in this
12 world that's zero risk.

13 Being that they're entirely different
14 commodities and being that NPBL has no other
15 intermodal customers other than -- no other
16 potential intermodal customers other than CSX,
17 there's near-zero risk.

18 And I might add that the operating
19 agreement requires that the rate be uniform,
20 but it doesn't require that it be put in the
21 tariff. You don't have to worry if it's
22 visible for other customers, non-owner
23 customers.

24 BY MR. WINGFIELD:

25 Q. Going back to the 2018 rate proposal,

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Exhibits 92-95

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Exhibit 96

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

No. 2:18cv530

CSX TRANSPORTATION, INC.,
individually and on behalf
of NORFOLK & PORTSMOUTH BELT
LINE RAILROAD COMPANY,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
et al.,
Defendants.

Remote Proceedings

December 8, 2020

9:47 a.m. - 6:38 p.m.

VIDEO DEPOSITION OF JAY STRONGOSKY
(via Teleconference)
(Highly Confidential)

Taken before SUZANNE VITALE, R.P.R., F.P.R.
and Notary Public for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the
above cause.

Job No. CS4358779

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1 difference is we pay for half of that dray in
2 Virginia to move from our Portsmouth terminal to the
3 Norfolk International Terminal. In Charleston -- in
4 Charleston, I don't -- I don't know who pays those
5 bills.

6 Q. Okay. Mr. Strongosky, for your purposes
7 in your role, is there a difference between having
8 access to a port and offering an on-dock service at
9 that port or terminal?

10 A. In my role, customers look at having
11 on-dock rail access as the preferred access for the
12 movement of their cargo.

13 Q. And what is your understanding of on-dock
14 rail access, what that term means?

15 A. Meaning a box goes directly from a marine
16 terminal to a railcar or a railcar directly to the
17 marine terminal.

18 Q. And by "directly," you mean it does not
19 move via drayage in between those two points; is
20 that right?

21 A. That's correct.

22 Q. And just to be clear, you earlier
23 mentioned, Mr. Strongosky, that in Virginia you
24 pay -- "you" being CSX -- pays half the cost of the
25 dray from Norfolk International Terminal to CSX's

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1 railroad to provide services to West Coast-located
2 ports or terminals; is that correct?

3 A. We offer interchange services through
4 West Coast railways or Canadian railways, for that
5 matter, who subsequently serve the ports along the
6 Pacific Coast.

7 MR. THORNBURGH: I think this would be a
8 good time for a break. If that works, we can
9 go off the record.

10 THE VIDEOGRAPHER: The time is 10:48 a.m.
11 We're off the record.

12 (Short recess taken.)

13 THE VIDEOGRAPHER: The time is 11:01 a.m.
14 We are back on the record.

15 BY MR. THORNBURGH:

16 Q. Welcome back, Mr. Strongosky.

17 Mr. Strongosky, does CSX -- does CSX have
18 a preferred port for transporting international
19 intermodal containers?

20 A. No.

21 Q. Why not?

22 A. We try to remain -- we remain port neutral
23 in everything that we do. We do not control what
24 ports vessels call upon -- call on or discharge or
25 load from. So as a result, we do not try to develop

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1 a preferred port solutions. We are often --

2 Q. At some -- go ahead. I'm sorry.

3 A. Oh, we are very consistent in our
4 messaging to customers and ports that we are port
5 neutral.

6 Q. Fair enough.

7 With that said, some offer better margins
8 for CSX than others; is that fair to say?

9 A. Across the system, yes.

10 Q. When you say "across the system," what do
11 you mean by that?

12 A. Well, including all ports that we
13 represent as ports that we serve.

14 Q. Mr. Strongosky, I'd like to ask you about
15 the term -- the terms "single stack" and "double
16 stack."

17 Do you know what those terms mean?

18 A. Yes.

19 Q. Can you explain their relevance and what
20 they mean in your industry?

21 A. Sure. Creating double-stack efficiencies,
22 meaning the ability to load two containers, one on
23 top of the other, while moving rail transport, while
24 moving via rail, is more efficient and uses less
25 railcar capacity than a lane that would be single

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1 with customers?

2 A. No. I've acknowledged it if they've
3 asked.

4 Q. What -- what did -- do you recall any
5 specifics about what customers have asked about with
6 regards to this litigation?

7 A. Very -- no, no specifics have ever been
8 asked.

9 Q. Okay. I'd like to talk a little bit about
10 the pricing and bidding process for customers of CSX
11 for international intermodal container
12 transportation.

13 Can you explain to me a bit about how CSX
14 acquires new business for international intermodal
15 container services?

16 A. So most often a steamship line will
17 present to us an opportunity to bid on their rail
18 transportation portfolio in the form of RFP, request
19 for proposal. And embedded in that is the list of
20 service points that they request we serve for them
21 to consider buying a CSX solution.

22 Q. So usually -- if I understand you
23 correctly, Mr. Strongosky, usually you bid on a
24 portfolio of a customer's business, not a specific
25 lane; is that correct?

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1 A. Yes.

2 Q. And when CSX bids on a business, do you
3 know what volume will go through -- go through each
4 lane for the duration of the contract?

5 A. Can you say that again, please?

6 Q. When CSX bids on a customer's business,
7 does the company know what volume of intermodal
8 traffic will go through each lane that is included
9 in the contract proposal?

10 A. Yes. In most occasions, customers present
11 us with a file with their rail transportation volume
12 associated with each -- with each service point.

13 Q. And in the case of ports with more than
14 one terminal, is that specific to a terminal or to
15 just a port?

16 A. It depends on the customer. Some
17 customers specifically lay out the marine terminal.
18 Some others will just use as more of a geography.

19 Q. Does CSX ever include volume requirements
20 in its contracts?

21 A. Yes.

22 Q. Can you explain to me how those volume
23 requirements work?

24 A. So as part of our contract, we request
25 most often a combination of a specific minimum

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1 to capacity options and reduce transportation costs.
2 Shippers moving full truckload freight 500 miles or
3 more exclusively via truck are likely missing out on
4 the capacity and cost-savings benefits of intermodal
5 rail."

6 Do you see that?

7 A. Yes.

8 Q. And, Mr. Strongosky, I want to ask if you,
9 in particular, agree with that second sentence?

10 A. Yeah, I believe if you're a shipper of BCO
11 who's purchasing transportation via truck and it's
12 500 miles or longer, that there's probably an
13 opportunity to utilize intermodal transportation.
14 That would be appealing to you, whether it be for
15 economics or capacity.

16 Q. And so doesn't this sentence indicate,
17 Mr. Strongosky, that rail shippers like CSX are most
18 competitive with trucks for intermodal movement of
19 transportation -- excuse me -- of intermodal
20 movement of intermodal carriers of 500 miles or
21 more?

22 A. Yes. Movement via truck with 500 miles or
23 more, there's a better likelihood, we believe, that
24 the intermodal option could be more attractive.

25 Q. And if you turn to the second page of the

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Exhibit 98

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UNDER PROTECTIVE ORDER

Page 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO.: 2:18cv530

CSX TRANSPORTATION, INC.,
individually and on behalf of
NORFOLK & PORTSMOUTH BELT LINE
RAILROAD COMPANY,
Plaintiff,

vs.
NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,

Defendants.

TRANSCRIPT DESIGNATED UNDER PROTECTIVE ORDER
VIDEOTAPED DEPOSITION OF
DEAN PIACENTE
Friday, January 15, 2021
10:33 a.m. - 4:51 p.m.
Remote Proceedings

Stenographically Reported By:
Gina Rodriguez, RPR, CRR, CCP
Job No. CS4376064

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1 those others, but ONE and OOCL were probably the two
2 that stick out in my mind as ones where we had a
3 substantial upside in volume. And that upside would
4 have come through NIT, which would have been a
5 significant discussion with the Port of Virginia in
6 how to accomplish that.

7 Q. Are you aware of why they were more aligned
8 with the Port of Virginia?

9 A. I -- I would not have been aware as to why
10 they chose the Port of Virginia. CSX was always
11 looking for ways to get traffic off of any of the
12 ports that landed at the ports, but we didn't believe
13 we had high influence over why they chose a port or a
14 terminal.

15 Q. During your contract negotiations with ONE
16 or OOCL, did you ever discuss the potential to move
17 some of their volumes out of the Port of Virginia to
18 a different port?

19 A. We may have had discussions, I don't recall
20 specific ones, but I do recall specifically that any
21 attempts by us to influence change were -- were
22 fruitless; that we -- we came to realize that the
23 railroad pricing and operations were not the most
24 significant driver of what a steamship line looks at,
25 and choosing a port.

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1 There are many other factors that, you
2 know, we're not privy to, such as the port and
3 chassis availability and driver's frequency of
4 sailings, things -- things that we're not
5 necessarily privy -- privy to.

6 Q. Besides the ones that you just mentioned,
7 are you aware of any other factors that the ocean
8 carriers consider when they're deciding on a port to
9 call?

10 A. Availability of storage on-dock, port fees,
11 driver availability.

12 There are some carriers that are aligned
13 with other carriers, and if the other partner had
14 their reasons for landing at a port, the ability for
15 us to influence their aligned partner was even
16 slimmer because of their inability to, you know,
17 ship -- ship to different locations.

18 Q. Can you explain to me what you mean when
19 you say "their aligned partner."

20 A. From what I recall, the steamship lines
21 partnered with one another in alliances to maximize
22 the capacity on ships. And so they -- they came up
23 with some type of an agreement where one partner
24 could utilize the capacity of a ship owned by another
25 partner in certain trade lanes.

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1 BY MR. GENTRY:

2 Q. Is there a particular reason why trucks in
3 domestic intermodal are competitive up to 500 miles,
4 but, as you say, in international intermodal, trucks
5 are competitive up to 150 to 200 miles?

6 A. So the international intermodal supply
7 chain is much longer in terms of total distance from
8 the actual origin to the actual destination. So the
9 actual origin being a foreign country to the
10 destination.

11 And so the transportation equation would
12 be much larger than a domestic shipment from an
13 origin to a destination. And so speed on domestic
14 becomes a much more important factor than it does on
15 intermodal international where you have a longer
16 supply chain and a longer transit time.

17 Q. And at the Port of Virginia, is barging
18 also an option for ocean carriers?

19 MR. JUSTUS: Objection, vague.

20 A. Yeah, I think you would have to get more
21 specific when you ask about barging.

22 BY MR. GENTRY:

23 Q. So for ocean carriers that call on the Port
24 of Virginia for intermodal transportation services,
25 are there any barges that transport their containers

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1 MR. JUSTUS: Objection, misstates prior
2 testimony.

3 A. Coming out of the Port of Virginia
4 terminals, the primary competitor in consideration
5 was Norfolk Southern.

6 BY MR. GENTRY:

7 Q. Does CSX ever consider the truck rates out
8 of the Port of Virginia?

9 A. We certainly would look at the truck rates
10 to inland points, but we felt confident that when
11 we're beyond the 200-mile inland movements, that the
12 primary competitor would be the Norfolk Southern from
13 the Port of Virginia. We believed that we could
14 confidently offer a more competitive rate than
15 truckers could offer to places like the Ohio Valley
16 and Illinois.

17 Q. But CSX --

18 A. Sure.

19 Q. But CSX is looking at those truck rates
20 because they consider trucks to compete for that
21 business, right?

22 A. Not -- not to that distance.

23 If -- typically truckers just don't go
24 that far. So it is not a -- it's a very minor
25 consideration.

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1 Certainly, you always want to know your
2 competition and if anything changes, but when I was
3 in the role, truckers for inland movements were not
4 a primary consideration and were not part of the
5 discussion with the steamship lines. They were
6 always sort of a back -- a back-shop analysis just
7 to make sure there wasn't anything peculiar that was
8 changing.

9 Q. And I understand that CSX has a lane from
10 the port of New York/New Jersey, to Indianapolis; is
11 that right?

12 A. I believe so.

13 Q. And I also understand that Norfolk Southern
14 does not have a service to Indianapolis; is that
15 right?

16 A. I couldn't say that.

17 Q. What is the constraint on CSX's ability to
18 price in its New York/New Jersey to Indianapolis
19 lane?

20 MR. JUSTUS: Objection, lack of foundation.

21 A. We always consider railroad competition,
22 but there are other factors that play into pricing to
23 a distant market: How close is the BCO, and perhaps
24 are there West Coast origins into Indianapolis as
25 well that perhaps the NS could -- or other railroad

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Exhibits 99-102

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Exhibit 103

2/13/2020

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 What's at stake in North Charleston rail debate [Brotherhood of Locomotive Engineers and Trainmen]



Brotherhood of Locomotive Engineers and Trainmen

A Division of the Rail Conference of the International Brotherhood of Teamsters

What's at stake in North Charleston rail debate

(The following story by Daniel Brock appeared on the Charleston Regional Business Journal website on July 19, 2010.)

CHARLESTON, S.C. — On a warm evening in early July, North Charleston Mayor Keith Summey grabbed a microphone and laid out a plan to save his city.

Hundreds had come to Park Circle for a hastily organized public forum called by Summey, during which he unveiled an expansive new plan for commercial rail. It was a vision, he said, that would protect years' worth of redevelopment on the former Navy base from state lawmakers who didn't prioritize the city's residents.

"We have an obligation to the children to protect the way of life," Summey said.

The forum's open nature contrasted with the mayor's strategy in crafting the plan, contained in a memorandum of understanding linking North Charleston, local developer Shipyard Creek Associates and CSX Transportation.

The deal, which had been in the works for months and started coming together in earnest in late June, was hammered out in backroom meetings and kept out of the public eye. The mayor said he chose to play it that way so that opponents, two of whom he identified as the S.C. Department of Commerce and railroad operator Norfolk Southern, couldn't organize protest before the plan was made public.

If all goes well, the pact could pave the way for near-dock rail access to the S.C. State Ports Authority terminal under construction at the former Navy base, while achieving Summey's ultimate goal: protecting residential and commercial projects in the area by nixing rail access from the property's north end.

The plan's basics

Summey thought he had squared away the issue of northern rail access with a memorandum of understanding inked in 2002 that said the SPA would "use rail access exclusively from the south end of the property."

But other officials contend that agreement doesn't apply to them because they weren't involved in its drafting. Some have even backed plans for a sprawling intermodal facility on the base's north end, accessed by a rail line that slices through the heart of city redevelopment efforts.

Summey has attempted to outflank opponents with his latest move.

The basic tenets of the agreement are:

Abandonment of rail by CSX along Spruill Avenue.

Redevelopment of the Stromboli Avenue corridor, which runs between Meeting Street Road and Spruill Avenue in the Charleston Neck area.

Use of an alternative route that would move rail out of Park Circle.

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 What's at stake in North Charleston rail debate [Brotherhood of Locomotive Engineers and Trainmen]

Transformation of CSX's Cooper Yard and the Shipyard Creek Associates-owned Macalloy site into a state-of-the-art intermodal rail facility.

Installation of a rail loop connecting Meeting Street Road and CSX's S-Line.

Those steps would ensure southern rail access to the new intermodal terminal, if not the SPA's facility itself, which is not permitted for on-dock rail service.

All told, the agreement would remove 3.2 miles of rail from North Charleston, produce a half-mile connector and reopen a half mile of track that's currently closed. The city also would get more than 30 acres — some as part of the Rails-to-Trails Conservancy — that would allow for bike paths, park spaces and retail ventures.

The deal is far from final, as major hurdles such as financing and land acquisition exist. Officials familiar with the plan said federal grants, as well as city tax-increment financing and private investment, would fund the project. The grant money is not guaranteed, though, and without it, the deal would almost certainly collapse.

Officials indicated the price tag will be at least \$100 million — the amount to be publicly funded has yet to be determined — and the first phase would likely be completed in four to six years, in time for the new terminal's 2017 scheduled opening.

City Council convened after the forum and unanimously voted to send the memorandum to a final reading on Aug. 7. The next step would be to seek funding.

After Summey's presentation, residents crowded around large maps detailing proposed changes to the city's rail system, asking questions of CSX, Shipyard Creek and city officials.

"I don't really understand it yet, but it sounds good for Park Circle," said Joe Dodson, who moved to the historic neighborhood five years ago.

Truck-served port

Controversy has surrounded the debate over how best to utilize rail at the Navy base terminal almost since the project's inception. SPA officials maintain that the Charleston port will always be primarily served by truck and, at most, about 20% of its cargo will ever leave town by train.

Still, the debate over near-dock access to the maritime facility has been drawn-out and, at times, contentious.

Opponents of Summey's plan, who include Commerce, its for-profit S.C. Public Railways division and Norfolk Southern, say CSX will have a competitive advantage should the Macalloy terminal become a reality, with chief rival Norfolk Southern afforded inferior access to the property.

Since it owns the tracks and rail yard the facility would be built around, CSX could charge Norfolk Southern a hefty switching fee for use of its lines. It's a common practice in the rail industry, but could mean Norfolk Southern having to pay CSX thousands of dollars for every train pulling into and out of the Macalloy terminal.

But cost isn't Norfolk Southern's only concern, according to company spokesman Robin Chapman.

"It's an operational thing," Chapman said. "With a lot of traffic going in and out, if we're at the mercy of the dispatching of our competitor, guess who's going to get preference when the train comes in."

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What's at stake in North Charleston rail debate [Problems of Locomotive Engineers and Trainmen]
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CSX officials, who readily admit they would have the upper hand at Macalloy, haven't been moved by calls from lawmakers to grant Norfolk Southern equal footing, saying they've dealt with their own disadvantages through the years.

Fredrik J. Eliasson, CSX's vice president of emerging markets, said the Georgia Ports Authority built Norfolk Southern a near-dock terminal nearly a decade ago in Savannah, and CSX had no similar facility until last year.

"For 10 years, there was a difference in terms of the competitive landscape there," Eliasson said. "Any period, there are competitive advantages and disadvantages; it's just the way it is."

At the Maryland Port Administration's Dundalk Marine Terminal, Norfolk Southern handles all car switching itself and charges as much as \$490 per move.

Summey has suggested that Norfolk Southern could avoid the switching fee here by transporting its cargo by truck to its current intermodal facility on Goer Drive, some four miles up Interstate 26.

"That would be a considerable disadvantage to not have direct rail access when our competitor does," Chapman said.

One yard or two?

State lawmakers, such as Transportation Committee Chairman Larry Grooms, R-Bonneau, argue that a crippled Norfolk Southern would limit cargo destinations for shipping companies, thereby limiting the port's competitiveness.

Officials with S.C. Public Railways and their supporters say that equal dual access to a near-dock terminal is crucial to ensuring price-lowering competition that would make Charleston a viable option for container lines.

The Macalloy plan does include the option of building Norfolk Southern a facility on the former Promenade property, now known as Laurel Island, a former disposal area just north of the Arthur Ravenel Jr. Bridge. But the railroad and the state have both rejected the idea on several grounds — the site's location and bogginess among them.

But building Norfolk Southern a yard isn't the answer, according to Public Railways. The agency is adamant about bringing to the Navy base a single intermodal terminal that would serve both rail lines.

The reasoning, according to agency president Jeff McWhorter, is that two facilities cost twice as much to build.

"If you have the ability to build one facility that you can serve all the Class I railroads, and you can do that for half the cost, does that not make more sense?" McWhorter said.

At a single facility run by a third-party operator, areas would be designated for each rail line — not unlike the current situation at the port's rail-served terminals. There, Public Railways does the switching, said McWhorter, "and that runs smooth as can be," he said.

A single intermodal yard served by two Class I railroads seems to be a rarity. At Savannah, for instance, both lines have an on-dock presence, but at different intermodal sites. Industry experts, in fact, were hard-pressed to think of a single example on the East Coast.

There is one such facility at the Port of Virginia. The Virginia Port Authority inked a 20-year lease this month on an APM Terminals facility in Portsmouth.

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 What's at stake in North Charleston rail debate [Brotherhood of Locomotive Engineers and Trainmen]

The terminal, which has a capacity of 1 million 20-foot equivalent units, features a six-track rail yard that's accessible by CSX and Norfolk Southern. A third party, short-line railroad Commonwealth Railway Inc., owns the spur that leads into the facility and does switching for both companies.

"It isn't standard, that's for sure," said Robert Morris, the Georgia Ports Authority's director of external affairs.

Equal dual access

The cachet that comes from being able to offer both Class I railroads on a level playing field is what Public Railways officials, state lawmakers and port executives all along the East Coast are aiming for.

Getting it, however, isn't so easy.

"I think it's a good goal to strive for, because you can market that to your customers," said Joe Harris, public relations manager at the Port of Virginia. "You can say, 'We have on-dock service by the East's two Class I railroads. Take your pick.'"

The Virginia Port Authority stumbled into the situation after APM completed a half-billion-dollar terminal in 2007 and the economy fell apart. The authority also had long-term contracts locked in for the vast majority of shipping lines that called on the port, which helped draw APM to the bargaining table.

Though there is legitimate equal on-dock rail access at the APM site, it's just one of the Virginia Ports Authority's four terminals, which include Norfolk International Terminals, previously its largest facility.

Given the proximity and shared origins, it's understandable that Norfolk Southern dominates the area, traditionally handling more than 95% of the cargo at Virginia's ports, according to multiple industry experts.

"Norfolk is a situation where the shoe is on the other foot," in contrast to Charleston, said Chapman, the Norfolk Southern spokesman.

Harris spoke to the realities of the rail business, saying his port's relationship with Norfolk Southern and its previous incarnations stretched back for decades.

"We've always favored NS, because that's how it worked. CSX has always been a player, but not the big player. It's just how it evolved," Harris said. "I think (complete) dual access is something that I don't know is achievable."

Rival plans

State officials haven't been deterred in seeking parity. Some, including McWhorter, are pushing a plan that would place a single, dual-served intermodal facility on property currently allocated to the Clemson University Restoration Institute.

The idea would be to run Norfolk Southern trains onto the Navy base from the north, while CSX would access the facility via its tracks from the south.

The selling point lawmakers have gotten behind is that the agency would own and operate the facility, performing switching duties and putting trains together for both companies. CSX and Norfolk Southern would then pay equal switching fees (about \$120 per car, according to Public Railways) and other costs for equal access.

Another, less popular, idea would situate the rail yard on The Noisette Co.'s on-base property, possibly

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What's at stake in North Charleston rail debate [Brotherhood of Locomotive Engineers and Trainmen]

consigning the highly touted redevelopment project to an ignominious end. McWhorter said he never backed that plan, however, primarily because the site was too far removed from the new terminal.

But McWhorter added that he didn't have an issue with continuing to utilize rail that already runs through what he sees as a stalled development on the Navy base.

"I'm not really sure what the impact would be on the community," he said. "It's vacant land; nothing's really going on with it now."

Once off the base property, Norfolk Southern would use a piece of track that runs parallel to Virginia Avenue and is owned by the North Charleston Terminal Co., a two-thirds/one-third partnership between CSX and Norfolk Southern.

Two issues facing either site, though, as noted in the 2008 State Rail Plan Update commissioned by the state Commerce Department, are land availability and rail access.

Both of those properties are designated for other uses — The Noisette Co. project and the Restoration Institute's \$98 million wind turbine drivetrain testing facility.

Noisette President John Knott has said the plans would require "massive condemnation."

McWhorter seemed to cast doubt on the wind turbine facility's long-term prospects, noting that the Restoration Institute's grant from the Energy Department is for five years. He also said the land needed for the terminal is across the street from the testing facility and questioned whether the Institute had yet to attract a windmill component manufacturer who needed to locate on the property.

Restoration Institute officials countered that their grant is matched by \$53 million in private funding and that the aim is for the drivetrain facility to be self-sufficient in five years' time.

"That's just the beginning," Restoration Institute spokesman Peter Hull said.

McWhorter later said that he did not mean to question project's viability, while noting Public Railways is set to build a \$365,000 rail spur that will service the testing facility.

Sen. Paul Campbell, R-Goose Creek, a member of the State Transportation Committee, was also concerned with the effect a Clemson-based yard would have on the institute's employment potential.

"We have to protect job development on the Navy base," he said. "The drivetrain testing facility has the capability to produce a number of jobs for this area and state."

As for rail on The Noisette Co.'s property, although Public Railways is cleared by the federal Surface Transportation Board to operate on it, ownership of the real estate underneath has been the subject of a two-year legal battle between the Charleston Naval Complex Redevelopment Authority and the developer.

The redevelopment authority was created by the state to divvy up the Navy base land when it closed in 1996. It has previously tried to transfer ownership of the rail line to S.C. Public Railways, but state legislators have so far withheld from signing off on that deal.

A further obstacle for the Noisette site is its lack of commercial zoning, which Summey has stated he would not grant if the state were to obtain the property.

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What's at stake in North Charleston rail debate [Brotherhood of Locomotive Engineers and Trainmen]

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Of the three plans — Macalloy, Clemson and Noisette — the rail plan update singles out Macalloy as the most feasible site, saying it “holds the most promise.”

The primary obstacle remains access. If that was resolved, McWhorter indicated his agency might come on board.

“Look, if there were a way that we could get Norfolk Southern in from the south end and them not having to pay a bunch of money to CSX, we’re fine with that, too,” he said.

Officials aligned with the Macalloy project quietly question the motives of opponents who they say would benefit financially from other plans. CSX’s Eliasson called the focus on dual access a “red herring” that is distracting people from the real issue of how best to increase port volume and revenue, which would bolster the state economy as whole.

Some officials have indicated that money and control are driving Commerce’s push for the Clemson or Noisette plan. S.C. Public Railways would operate yards at either facility, taking in money for every train hookup, switch and crane lift.

McWhorter brushed aside the notion that opposition to the Macalloy plan is masking a cash grab by his agency.

“Absolutely not. Our goal is to do what we think is in the best interest of our state’s economy,” he said. “This is not a money-making venture for Public Railways. None of our money goes to the Department of Commerce. We’re not appropriated. We retain our earnings, and we reinvest in our capital. We run our operations.”

Tuesday, July 20, 2010

bentley@ble-t.org (<mailto:bentley@ble-t.org>)

<http://www.ble-t.org/pr/news/headline.asp?id=30950>

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Exhibits 104-107

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Exhibit 108

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*** FOR ATTORNEYS' EYES ONLY ***

Page 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC,
individually and on behalf of
NORFOLK & PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Plaintiff,

vs.

Case No. 2:18-CV-530

NORFOLK SOUTHERN RAILWAY COMPANY,
NORFOLK & PORTSMOUTH BELT LINE
RAILROAD COMPANY, JERRY HALL,
THOMAS HURLBUT, PHILIP MERILLI
and CANNON MOSS,

Defendants.

Job No. CS4358762

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*** FOR ATTORNEYS' EYES ONLY ***

Page 2

1 The Recorded Deposition of CHRIS WAGEL,
2 Taken via Hanson remote,
3 Commencing at 9:36 a.m.,
4 Monday, December 7, 2020,
5 Before Dora L. Benson, CSR-6110.

6
7 Court reporter, attorney(s) and witness appearing remotely.

8
9 APPEARANCES:

10
11 ASHLEY PETERSON
12 McGuireWoods, LLP
13 Gateway Plaza
14 800 East Canal Street
15 Richmond, Virginia 23219
16 (804) 775-1190
17 apeterson@mcguirewoods.com

18 Co-Counsel appearing on behalf of the Plaintiff CSX
19 Transportation and Chris Wagel.

20
21
22
23
24
25

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1 A. No.

2 Q. Were you asked to look for any other kinds of business
3 records to --

4 A. No.

5 Q. -- support that 200 container number?

6 A. I was just asked to -- here, it is. Here's the
7 information.

8 Q. Okay. When you say in that drayage can reliably
9 handle, what do you -- what do you mean by reliably
10 handle?

11 A. Actually get it done. You could have an accident in
12 the tunnel. You could have an accident on the main
13 road that comes in and out of NIT, which could happen.
14 Something in the tunnel happens, you have to go to the
15 other. So there was a little -- a few stumbling
16 blocks. Because typically they would take the midtown
17 versus the downtown because it was closest.

18 Q. Were there other factors that affected whether
19 containers would reliably be drayed?

20 A. Gate hours, the availability of drivers, chassis,
21 backups at NIT on the gate.

22 Q. Can you recall how many times you had a problem with
23 availability of drivers?

24 A. Not off the top of my head, but if they're not
25 available -- I mean, sometimes they would get stuck in

1 Saturday, but never on Sunday.

2 BY MS. REINHART:

3 Q. If I heard you correctly, I heard you say that
4 sometimes they would change for business needs. Are
5 you aware of whether there were times when the gates
6 were open longer than 5 a.m. to 6 p.m.?

7 A. There were probably a few instances while I was there.
8 The exact number I don't know, but I remember seeing
9 e-mails from the port that they did do that
10 occasionally.

11 Q. Do you know how it was determined when the gates would
12 be open beyond 5 a.m. to 6 p.m.?

13 A. If there was, like, a weather event, something with a
14 stacking operation, something with maybe a breakdown
15 on the main road moving in and out of NIT, they would
16 make changes. And it was always communicated via
17 e-mail.

18 Q. Do you know whether there were weekend hours?

19 A. Sometimes they would run Saturday hours, but it was
20 rare.

21 Q. Do you know how they determined to run Saturday hours?

22 A. I do not know, no.

23 Q. Did you ever ask the port to extend the gate hours?

24 A. No.

25 Q. Do you know if anybody at CSX asked the port to extend

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Exhibits 109-118

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

EXHIBIT 3

DISTRICT COURT LITIGATION
TRANSCRIPT OF PROCEEDINGS

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1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,

Defendants.

CIVIL ACTION NO.
2:18cv530

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 10, 2023

BEFORE: THE HONORABLE ROBERT J. KRASK
United States Magistrate Judge

JODY A. STEWART, Official Court Reporter

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2

1 APPEARANCES:

2 MCGUIREWOODS LLP

3 By: Benjamin L. Hatch

4 Robert W. McFarland

5 Jeanne E. Noonan

6 V. Kathleen Dougherty

7 William C. Geddy

8 Counsel for CSX Transportation, Inc.

9 TROUTMAN PEPPER HAMILTON SANDERS LLP

10 By: Michael E. Lacy

11 Alan D. Wingfield

12 - and -

13 SKADDEN ARPS SLATE MEAGHER & FLOM LLP

14 By: Tara L. Reinhart

15 Counsel for Norfolk Southern Railway Company

16 CRENSHAW WARE & MARTIN PLC

17 By: Alexander R. McDaniel

18 W. Ryan Snow

19 Counsel for Norfolk & Portsmouth Belt Line

20 Railway Company

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3

1 (Hearing commenced at 3:33 p.m.)

2 THE COURT: Good afternoon, everybody. This is
3 Judge Krask.

4 Madam clerk, if you will call the case.

5 THE CLERK: CSX Transportation, Incorporated, versus
6 Norfolk Southern Railway Company, et al., civil case action
7 number 2:18cv530.

8 Are the parties ready to proceed?

9 MR. McFARLAND: Good afternoon, Your Honor. This is
10 Robert McFarland on behalf of Plaintiff CSX, and we are
11 certainly ready to proceed.

12 MR. LACY: Good afternoon, Your Honor. Michael Lacy
13 on behalf of Defendant Norfolk Southern, and we are ready to
14 proceed.

15 MR. SNOW: Good afternoon, Your Honor. This is Ryan
16 Snow and Alexander McDaniel on behalf of the Belt Line, and
17 we are ready.

18 THE COURT: Good afternoon, everybody. Let me just
19 start by reminding everyone that the operation of recording
20 technology other than by the court reporter or the
21 broadcasting of this conference by anyone is prohibited
22 pursuant to local Rule 83.3.

23 I received the parties' filings today that were
24 docketed as ECF Number 576 and various subparts of that. I
25 have one question about the proposed stipulated order on

JODY A. STEWART, Official Court Reporter

1 trial schedule, I believe that is ECF Number 576-5, and I
2 wanted to ask the parties if I'm misunderstanding the last
3 paragraph of Page 2 of that document or whether something's
4 missing.

5 MR. WINGFIELD: Your Honor, this is Alan Wingfield
6 for Norfolk Southern. If you would like me to address the
7 rationale for that language, maybe I might provide
8 clarification of what we are trying to accomplish there.

9 THE COURT: Please.

10 MR. WINGFIELD: So the parties endeavored to reduce
11 the amount of deposition designations in this case, and the
12 low-hanging fruit was not to use deposition designations for
13 witnesses that are going to end up appearing live at trial.
14 So the parties agreed to withdraw deposition designations of
15 witnesses that appear live at trial. We have a list of those
16 live witnesses that have been exchanged from the parties, and
17 the submission of the deposition designations that you
18 receive today eliminated order of magnitude 14 to 15
19 deposition transcripts altogether based on this approach.

20 Of course, we are lawyers, and we worry about
21 worst-case scenario, and the worst-case scenario is what if
22 one of these live witnesses gets sick, doesn't show up,
23 whatever, right, we worry that, you know, that the
24 opportunity of this necessary evidence as a live witness,
25 instead of using the deposition designation, fall through

1 through accident or fate.

2 So this paragraph is intended to address that
3 situation, and what this paragraph intends to say is that if
4 disaster strikes, in the unlikely event that some live
5 witness does not show up, for whatever reason, is not
6 available, have evidence taken from them, that's when at that
7 point the parties are allowed, notwithstanding the withdrawal
8 of the deposition designations, to pull that deposition
9 designation back into the record and use that instead.

10 Now, and we were also proposing, given the
11 unlikelihood of having to use these deposition designations,
12 that we also not -- not necessary or at least would be
13 something we would be happy not to do, and that is go through
14 the objections pretrial on the depositions. So, you know,
15 frankly, there is a little bit of, you know, risk here that
16 one witness might not show up, or we have to use the
17 deposition designations, objections have not been brought
18 through on that deposition, but, you know, in terms of cost
19 benefits and the risk of it all, we think it is, you know,
20 readily unlikely that we will actually have a problem of any
21 live witnesses and need to bring forth the deposition
22 designations.

23 Let's say if we have a problem with one witness,
24 and, therefore, one transcript, that Judge Davis could just
25 deal with objections in the context at trial that then

1 prevail. In that sense there will be a lot of dynamics about
2 simplifying the presentation, et cetera, at that point.

3 So this paragraph was designed to place in the
4 record that a party can bring a withdrawn deposition
5 designation forward to be used at trial if a live witness
6 doesn't show up, and that we are not going to have rulings on
7 objections of designations pretrial because of this
8 arrangement designed to save time and energy for everybody on
9 a process, and it really should not need to be done at any
10 kind of use for these deposition designations, and,
11 therefore, resolution of objections thereto.

12 So that's the thought process. It was discussed
13 thoroughly between counsel multiple times, and we are trying
14 to reduce the use of depositions, especially in light of
15 Judge Davis' requirement that all depositions be done live at
16 trial, and also practical dynamics, it is much preferable to
17 be using live witnesses anyway, so a lot of tactical judgment
18 and compromising did go into this conversation. There are
19 things in the deposition designations that, you know, might
20 be helpful, et cetera, but the parties made a rudimentary
21 judgment that this is the way to go for the good of the case.

22 THE COURT: Thank you for that explanation.

23 Mr. McFarland.

24 MR. McFARLAND: Your Honor, one clarification. It
25 is CSX's position that in the event a witness who was

1 supposed to appear live to testify is not able to, and his or
2 her deposition has been submitted, CSX agrees we will just
3 withdraw our objections; the transcript goes in. The
4 defendants are taking the position that they want to preserve
5 the objections in the event the transcript goes in. That's
6 their position.

7 We are willing to, for this accommodation, to say,
8 particularly in a bench trial, we will waive our objections.
9 So we would have no objections for Judge Davis under the
10 scenario that Mr. Wingfield just described, we would have no
11 objections to any depositions that are offered in this
12 context.

13 THE COURT: Understood. It just appears to me, and
14 I appreciate you explaining the rationale for this paragraph,
15 but it looks like you've left out perhaps part of the
16 sentence that you say, "In the unlikely event that a witness
17 who has been disclosed by any party as appearing live,"
18 something is missing. It's unable to attend or something
19 like that. I think that may be what confused me about the
20 provision.

21 MR. McFARLAND: I think that's correct, and we can
22 certainly add that in. We just caught that ourselves. With
23 all that's been going on, maybe we are not going to get
24 A-pluses on our proofreading today, Your Honor.

25 THE COURT: That's all right. I know you have been

1 very busy, so that's fine. I guess what I would suggest is
2 to the extent that the unthinkable happens, and somebody is
3 expected to be live, can't make it for some reason, if there
4 are deposition objections to be addressed, certainly my
5 strong preference would be that, given the number of lawyers
6 that you have, that the parties submit that deposition to me,
7 and I'll rule on the objections independent of what's
8 happening in the courtroom, if there are any remaining
9 objections, and we not trouble Judge Davis with any of that
10 during the midst of the trial. So that would be my guidance
11 on that point.

12 MR. MCFARLAND: Will do, Your Honor. Thank you.

13 THE COURT: All right. Thank you very much.

14 Then that brings us to the remaining motions that
15 are at least pending before me at this time, and I want to
16 rule on those. I will start with Norfolk Southern's motion
17 to exclude Dr. Marvel's opinions, which is ECF Number 465.

18 On December 2nd, the Court ruled from the bench upon
19 CSX's motion *in limine* to exclude the Belt Line's expert,
20 Thomas Crowley. In so ruling, I discussed the pertinent
21 legal inquiry required by Rule 702 and caselaw addressing
22 challenges to proposed expert testimony. I have applied the
23 same precepts and burden of proof in analyzing the defense
24 challenges -- and that, of course, includes the Belt Line's
25 motion, as well, which I will get to in a moment -- to the

1 proposed testimony of CSX's expert, Dr. Howard Marvel.
2 Because I am reciting my rulings regarding Dr. Marvel in this
3 conference now, I incorporate by reference my introductory
4 discussion in ruling upon the motion directed to
5 Mr. Crowley's testimony, without need to recite it again
6 today.

7 To the extent that certain aspects of the
8 defendant's challenges to Dr. Marvel's analysis have been
9 effectively resolved by the Court's summary judgment ruling,
10 I do not intend to address them as part of this ruling.

11 Also, due to the summary judgment ruling, this
12 matter is now set for a bench rather than a jury trial.
13 Although Rule 702 continues to apply, the flexibility
14 inherent in the *Daubert* inquiry is expanded, as the main
15 purpose of that inquiry is to protect a jury from the
16 improper influence of dubious expert testimony. For that I
17 cite *Nease versus Ford Motor Company*, 848 F.3d 219 at 231,
18 that is a Fourth Circuit case from 2017, which is citing an
19 Eighth Circuit case from 2011, which is *In re Zurn Pex*
20 *Plumbing Products Liability Litigation* that is at 644 F.3d
21 604 at 613. As the Court is now the trier of fact at the
22 bench trial, the need for gatekeeping is somewhat diminished,
23 as the Court is well-situated to access issues regarding the
24 relevance and reliability of Dr. Marvel's testimony during
25 and in the context of the trial. For this I cite, by way of

1 example, *Herndon versus Huntington Ingalls Industry, Inc.*,
2 which is case number 4:19cv52, that is found at 2020 Westlaw
3 5809965 at *4. That is an Eastern District of Virginia
4 ruling from August 28th, 2020. It was a report and
5 recommendation that was subsequently adopted at 2020 Westlaw
6 5809996 on September 29, 2020. I also cite the case of
7 *Traxys North America, LLC, v. Concept Mining, Incorporated*,
8 at 808 F.Supp.2d 851 at 853. That is a Western District of
9 Virginia case from 2011.

10 With that background, I rule as follows: I begin
11 again with Norfolk Southern's motion to exclude Dr. Marvel's
12 opinions. Norfolk Southern argues that Dr. Marvel's claim
13 that carrier making intensive use of NIT (that is, moving a
14 substantial portion of their container traffic through NIT)
15 are beholden to Norfolk Southern, rests upon a faulty
16 assumption that there exists inherent carrier demand for and
17 a need to use NIT. Norfolk Southern asserts this assumption
18 lacks factual support and that other causes, primarily
19 railroad alignment and decision by Port of Virginia
20 officials, explain carrier usage of NIT. These factors,
21 Norfolk Southern asserts, rather than the lack of viable
22 substitute terminals or transportation options, including
23 drayage, or the misconduct alleged by CSX, explain the
24 intensity of NIT usage and establish that Dr. Marvel's
25 pricing and profitability model is unreliable.

1 CSX argues that the record shows, and Dr. Marvel
2 relied upon, other facts establishing that some carriers make
3 intensive use of NIT for reasons independent of simply
4 railroad alignment and Port of Virginia decision-making.

5 The Court agrees that there appears to be admissible
6 facts to support such an insertion. The record indicates
7 that, although railroad alignment and Port of Virginia
8 decisions play a role in carriers' use of NIT, a variety of
9 other factors are also at work. These include: One, NIT's
10 capacity to handle greater volumes of containers (leaving
11 aside the effects of more recent terminal upgrades), that is
12 at ECF 469-1 at 23, note 51.

13 Second, NIT's greater berth capacity, namely, six
14 versus three at Virginia International Gateway), and for that
15 I cite ECF Number 487-1 at 9 and ECF Number 469-36 at
16 Paragraph 83; and, third, port structure, carrier alliances,
17 the number of containers at issue, the size of a carrier's
18 ship, the day of the week (berth window), and weather, ECF
19 Number 469-15 at 5 and ECF number 487-1 at Pages 6 and 7.

20 Indeed, although a Port of Virginia witness
21 testified that the port attempts to assign a carrier to a
22 terminal based on railroad alignment, he also listed various
23 factors, with the railroad party being the fourth in apparent
24 order of importance. That is at ECF 469-14 at 3 and ECF
25 Number 487-1 at Pages 6 through 14 (describes berth window,

1 volume of containers (move count), estimated rail and gate or
2 truck volume and looking at "rail breakdown" -- "how much are
3 those ocean carriers Norfolk Southern and/or CSX."

4 Further, other witnesses, including Mary Clare
5 Kenney and Ryan Houfek, have testified that the carriers and
6 the port decide which terminals to use, ECF Number 47-3 at 5,
7 and that some carriers are "sort of aligned with certain
8 terminals," ECF Number 487-4 at 4, and I also direct the
9 parties to see ECF Number 469-36 at Paragraph 74, ECF Number
10 487-2 at 3 (Carl Warren's declaration identifying several
11 ocean carriers as "primary NIT users).\" I also cite ECF
12 Number 469-1 at Paragraph 34 and 41 through 49 (discussing
13 again "primary NIT users").

14 Dr. Marvel's reply report, ECF Number 469-36 at
15 Paragraph 66 through 90, also supplies factual bases for his
16 contention that factors other than railroad alignment are the
17 primary drivers of port and terminal utilization and support
18 his assessment that CSX could not "simply steer traffic to
19 VIG or PMT, the Portsmouth Marine Terminal.\" His report
20 identifies, among other things: First, data indicating that
21 carriers' use of Port of Virginia terminals, including NIT,
22 has been "quite stable,\" and that several carriers have
23 consistently and primarily used NIT, at Paragraph 70.
24 Second, he identified data showing that such stability has
25 existed even when carriers switched railroad alignment to and

1 from Norfolk Southern and CSX. That's Paragraph 76 through
2 79. Third, he identified the significance of carrier
3 alliances in supporting that stability of use, regardless of
4 railroad alignment, Paragraphs 80 and 81. Fourth, he
5 identifies capacity constraints that limit the ability to
6 bring new business to Virginia International Gateway,
7 Paragraph 84; and, fifth, that the Portsmouth Marine
8 Terminal, in spite of its on-dock rail access, was not a
9 viable substitute for NIT or VIG, as indicated by Norfolk
10 Southern's limited use of the same and by the decision to
11 "mothball" it after 2010, and its limited restart in 2014 to
12 deal with capacity constraints at VIG, and that's at
13 Paragraphs 85 through 90.

14 Thus, factual bases exist to support Dr. Marvel's
15 contention that railroads have limited ability to steer
16 carriers' freight at NIT to other terminals or to influence
17 carriers' decisions regarding the choice of ports. See ECF
18 number 469-1 at Paragraph 51. The existence of disputes
19 about such facts and the causes of carriers' usage of NIT is
20 not a basis for excluding Dr. Marvel's testimony. For that I
21 cite Rule of Evidence 702 and specifically the Advisory
22 Committee Notes from the 2000 Amendments which note that
23 experts may reach different conclusions based upon how they
24 weigh certain disputed facts, but a Court may not exclude
25 testimony based on its belief as to which set of disputed

1 facts is correct.

2 The Court reaches no conclusion about whether
3 Dr. Marvel's analysis is correct. Rather, it finds that the
4 issue raised by Norfolk Southern about the facts underpinning
5 his assessments regarding the intensity and stability of
6 carrier use of NIT go to the weight and not the admissibility
7 of Dr. Marvel's testimony, which in this respect has been
8 shown by a preponderance of evidence to be reliably based
9 upon sufficient facts. For that I cite the case of *Blesler*
10 *Versus Wilmington Trust Company* at 855 F.3d 178 at Page 195
11 of the Fourth Circuit case from 2017.

12 Norfolk Southern next argues that Dr. Marvel's
13 models are unreliable because they "fail to distinguish
14 between the alleged anti-competitive conduct and ordinary,
15 legitimately occurring competitive forces," and that's at
16 Page 28 of their motion.

17 As to alleged harm to competition/liability,
18 Dr. Marvel began by reviewing the facts, which he opined
19 effectively foreclosed on-dock rail access by CSX to NIT. He
20 then hypothesized that CSX's lack of access to NIT would
21 enable Norfolk Southern to charge higher price to those ocean
22 carriers most reliant on NIT. He next reviewed empirical
23 evidence consistent with this hypothesis showing that the
24 average price charged by Norfolk Southern to move a 40-foot
25 container from NIT to Chicago was higher for an ocean carrier

1 sending a certain percentage of its traffic in 2017 through
2 NIT than for another carrier, who he specifically identified,
3 sending less traffic through NIT for the same route.

4 The carriers, dollar amounts, and percentages are
5 noted in Paragraph 79 of his initial report. Dr. Marvel then
6 engaged in regression analysis to examine the relationship,
7 if any, between Norfolk Southern's per-container pricing and
8 profitability (revenue/cost ratio) (both of which are
9 dependent variables) and ocean carriers' intensity of use of
10 NIT (the independent variable). Based on this analysis, he
11 opined that ocean carriers that were more heavily reliant on
12 NIT paid higher container prices to Norfolk Southern and were
13 thereby harmed, and Norfolk Southern's profit margins were
14 higher for such carriers.

15 Norfolk Southern argues that this regression
16 analysis failed to consider whether the effects or harms
17 posited were due to alleged anticompetitive conduct or to
18 other legitimate competitive factors, such as Norfolk
19 Southern's earlier double-stacking capability, CSX's alleged
20 service problems from 2016 through 2020, and Norfolk
21 Southern's routing advantages from the Port of Virginia to
22 the Midwest (including its routing advantage at NIT).

23 For *Daubert* purposes, the key is whether the
24 expert's regression model failed to account for critical
25 explanatory variables, and for that I cite *In re Linerboard*

1 *Antitrust Litigation* at 497 F.Supp.2d 666 at Page 678. That
2 is an Eastern District of Pennsylvania case, and as opposed
3 to less important variables that go to the weight but not the
4 admissibility of the analysis, and I cite there *Smith versus*
5 *Virginia Commonwealth University*, which is a Fourth Circuit
6 1996 case at 84 F.3d 672 at 676 and '77 (notes that "common
7 sense" and Supreme Court caselaw indicate that a regression
8 model should account for the major explanatory factors), and
9 that case cites *Bazemore v. Friday*, a Supreme Court case from
10 1986 with the cite of 478 U.S. 385 at 400.

11 Dr. Marvel then testified that his "rate regression
12 did not distinguish between anticompetitive effects and
13 legitimate competitive differences." That is at ECF 469-3 at
14 19. Though acknowledging that his model did not rule out
15 other factors as contributing to Norfolk Southern's higher
16 pricing and margins, and that is cited at Page 18 of the same
17 exhibit, Dr. Marvel identified the "most obvious" factors
18 supporting the higher pricing and margins to be the
19 anticompetitive conduct alleged by CSX, and that is at Pages
20 17 and 18 of that same exhibit. When asked whether his model
21 accounted for legitimate differences in railroad
22 capabilities, Dr. Marvel elaborated that the "differences
23 with NIT is that there you have got...significant and
24 competitive restraints that are in place that are operating
25 on top of any effects of leading one to prefer one carrier

1 over another." That is at ECF Number 469-3 at Pages 18 and
2 19. He described this anticompetitive behavior primarily in
3 Paragraph 56 through 62 of his initial report, cited at ECF
4 Number 469-1 at Paragraphs 56 through 62.

5 Although Norfolk Southern points to facts supporting
6 its contrary claims, there is no competing regression model
7 before the Court examining the significance of legitimate
8 competitive differences in the pricing and margins about
9 which Dr. Marvel opines. There appears to be little dispute
10 that Dr. Marvel's pricing and margin model does not
11 distinguish between anticompetitive and legitimate
12 competitive factors. Thus, his conclusion about harm to
13 competition (specifically ocean carriers) is not supported by
14 testing as he, himself, acknowledged. For that I cite to
15 Paragraph 80. Nor is there any claim regarding peer review,
16 publication, or general acceptance of the specific
17 methodology used by Dr. Marvel here.

18 That leaves the question whether Dr. Marvel, as an
19 academic and economist, may opine based on his education,
20 training, knowledge, and professional experience, described
21 in ECF 469-1 in Paragraphs 1 through 4, that the
22 anticompetitive actions he identified as effectively
23 foreclosing CSX from on-dock rail access at NIT were the main
24 reasons for the pricing and margin effects shown by his
25 regression analysis. In spite of some reservations, I

1 conclude that he may so opine on the grounds discussed below,
2 and because this case is to be tried by the Court, and the
3 flexibility inherent in the *Daubert* inquiry is enhanced by
4 the fact that there will be a bench trial.

5 To begin, Dr. Marvel's proposed testimony about the
6 result of his regression analysis should not be divorced from
7 the remainder of his reported opinions and analysis upon
8 which they rest. For example, Dr. Marvel discussed the
9 economics of dual rail terminal access and its favorable
10 effect, among others, upon freight transportation pricing at
11 Paragraphs 70 through 71 of his initial report. He also
12 discussed factors affecting carrier demand for intermodal
13 services, including the desire to concentrate most container
14 traffic with a single, aligned railroad, with reliable
15 service and the ability to handle specified volumes of
16 container traffic. That's at Paragraphs 11, 26 and 32 of his
17 report. He discussed how, absent dual access and when a
18 competing railroad can only offer a higher cost and
19 less-attractive option like drayage, competition is limited,
20 permitting the sole railroad with on-dock access to charge a
21 higher price for its superior product. That's at Paragraph
22 71 of his report.

23 Dr. Marvel then opined that CSX was a "hamstrung"
24 competitor, effectively foreclosed from accessing on-dock
25 rail at NIT, due to the defendants' anticompetitive acts,

1 including the excessive switch rate allegedly charged by Belt
2 Line. Here I cite Paragraphs 15, 52 through 54 and 56 of his
3 initial report. He also advised that this alleged
4 anticompetitive behavior impacted and raised CSX's costs,
5 thereby enhancing Norfolk Southern's pricing behavior.
6 That's Paragraph 73. The defendants' acts, he opined,
7 restricted competition, weakened CSX, restricted output, and
8 enabled Norfolk Southern to charge higher prices to carriers.
9 Dr. Marvel summarized this analysis in a three-step chain of
10 causality described in Paragraph 55 of his initial report.
11 In contrast to CSX's "hamstrung" situation at NIT, Dr. Marvel
12 found that, in 2018 CSX was able to capture well in excess of
13 50 percent of container traffic for those carriers who used
14 NIT for a small portion of their container movements, a
15 percentage far exceeding its overall share of container
16 movements for all ocean carriers. There I cite Paragraphs 20
17 and 85 of his initial report. This latter, albeit somewhat
18 crude measure, arguably suggests not only that CSX was able
19 to compete with Norfolk Southern when it was not otherwise
20 "hamstrung," but also that the legitimate competitive
21 differences cited by Norfolk Southern are not the primary
22 drivers of the pricing behavior revealed by Dr. Marvel's
23 regression model.

24 In responding to Dr. Wright's critiques of his
25 analysis, Dr. Marvel also indirectly addressed some of the

1 legitimate competitive differences relied upon by Norfolk
2 Southern. For example, in his reply report, Dr. Marvel
3 opines that, "CSX's impediment to growth was not its lack of
4 investment in infrastructure...but [the defendants'] refusal
5 to give CSX on-dock rail access to NIT," and that is ECF
6 Number 469-36 at Paragraph 109. In doing so, Dr. Marvel
7 addressed Dr. Wright's assertion that CSX operated at a
8 competitive disadvantage due to its inability to offer
9 double-stack service until the end of 2016, by examining
10 CSX's ability to compete for carriers relying mainly on VIG
11 versus NIT, and that is at Paragraph 118, and by examining
12 the sizable differences in CSX's "muted growth at NIT"
13 relative to the growth in its share of container movements at
14 VIG, and I cite there Paragraphs 109 through 115.

15 Moreover, to the extent that Norfolk Southern relies
16 upon its double-stacking capability and its reported shorter
17 routes for moving containers to the Midwest, there is no
18 evidence that any such advantages translated into reduced
19 costs and pricing. This arguably supports Dr. Marvel's
20 assertion that the increased pricing he observed primarily
21 resulted from anticompetitive conduct. Further, to the
22 extent that Norfolk Southern contends that it had a
23 legitimate competitive routing advantage at Norfolk
24 International Terminal, by virtue of using its own tracks to
25 efficiently move trains through the terminal, this difference

1 is arguably bound up in the dispute about whether the alleged
2 anticompetitive acts effectively foreclosed CSX from making
3 cost-effective and efficient use of the Belt Line's access to
4 NIT.

5 Dr. Marvel also addressed Dr. Wright's critique of
6 his regression model as to pricing and profitability. After
7 substituting for Dr. Wright's use of absolute container
8 volume at NIT by means of the proportion of containers at
9 NIT, Dr. Marvel continued to find statistically significant
10 and positive relationships between NIT traffic volume and
11 Norfolk Southern's pricing, and that is at Paragraphs 94
12 through 96 of his reply report.

13 Dr. Marvel also analyzed and concluded that drayage,
14 as well as access to other Port of Virginia terminals by CSX,
15 were inadequate substitutes for on-dock access to NIT. Here
16 I cite his initial report at Paragraphs 41 through 51, as
17 well as his reply report at Paragraphs 37 through 44, which
18 discuss the inferiority of drayage. He also considered
19 whether the availability of competing alternatives for
20 container transport, such as trucking or the usage of other
21 ports, effectively restrained Norfolk Southern's use of
22 pricing power and concluded otherwise, and that is in his
23 reply report at Paragraph 37 through 54.

24 Finally, Dr. Marvel also took note of the fact that
25 the defense experts offered no procompetitive justifications

1 for the defendants' actions. He suggested that this
2 confirmed that his opinions that the defendants'
3 anticompetitive behavior led to the container transport
4 pattern shown in his report, and that is in his reply report
5 at Paragraph 3, 11 and 20. Dr. Marvel reiterated that
6 anticompetitive conduct restricted the output of container
7 traffic by rail at NIT, thereby enabling Norfolk Southern to
8 raise prices to carriers using that terminal, and that is at
9 Paragraph 20.

10 Thus, in conjunction with his regression model,
11 Dr. Marvel addressed various factors bearing upon whether the
12 pricing power (and margins) identified by the model were
13 primarily caused by the defendants' alleged anticompetitive
14 conduct or were due to other competitive and market factors.
15 Though concluding that Norfolk Southern's on-dock conduct
16 service at NIT was superior to the other poor substitutes
17 available to CSX, he opined that this result primarily
18 stemmed from the alleged anticompetitive acts and efforts of
19 the defendants that effectively foreclosed CSX from accessing
20 NIT by rail. That is at Paragraph 101. Although it is a
21 close call, and as this matter is to be tried by the Court, I
22 conclude that CSX has carried its burden to establish that
23 this aspect of Dr. Marvel's testimony is reliable.
24 Accordingly, the parties' dispute about which explanation
25 controls, falls to the Court in its consideration of the

1 competing facts to be marshaled at trial. For that I cite
2 the *Pipitone versus Biomatrix, Incorporated*, case, Fifth
3 Circuit case from 2002 at 288 F.3d 239 at Pages 249-50, which
4 parenthetically specifies that where "the answer to the
5 critical causation question will depend on which set of
6 predicate facts the fact finder believes...the fact finder is
7 entitled to hear [the expert's] testimony and decide whether
8 it should accept or reject that testimony" based upon the
9 metrics typically employed for that purpose at trial,
10 including competing factual narratives.

11 This brings me to the damages model of Dr. Marvel.
12 In briefing following the Court's summary judgment rulings,
13 the parties appear to agree that it remains for CSX to
14 establish not only harm to competition but also antitrust
15 injury, threatened or prospective to CSX. For this I cite
16 the most recent filings, ECF Number 565 at Pages 3 through 4
17 and ECF Number 566 at Page 2. Because CSX may seek to rely
18 upon Dr. Marvel's analysis to satisfy that burden, the Court
19 also addresses Norfolk Southern's challenges to Dr. Marvel's
20 damages model.

21 Norfolk Southern argues that Dr. Marvel's damages
22 model is unreliable because it is bound to find damages where
23 carriers use any port intensively. This argument rests in
24 significant part upon Dr. Wright's contention that terminal
25 usage is driven mostly by VIT's assignment of carrier traffic

1 based on railroad alignment. As the Court has already
2 decided, however, the facts supporting such a conclusion are
3 disputed and will have to be addressed at trial. In response
4 to Dr. Wright's criticism of his model, Dr. Marvel's reply
5 report indicates that he ran a similar regression analysis by
6 omitting the NIT covariate, and after doing so continued to
7 obtain results indicating that a carrier's reliance on
8 Hampton Roads as a whole made the carrier less likely to
9 align with CSX, and that is in his reply report at Paragraphs
10 119 through 125. Thus, even discounting for Dr. Wright's
11 contention that carrier use of NIT is a product of railroad
12 alignment and assignment, Dr. Marvel's model continued to
13 generate similar results.

14 Norfolk Southern also argues that Dr. Marvel's
15 damages model and opinions, like the pricing/profitability
16 model, fail to sort among legitimate competitive differences
17 and the defendants' alleged anticompetitive conduct. Leaving
18 aside whether Dr. Marvel's results are correct, however, the
19 Court finds that the damages model attempts to isolate
20 effects that are NIT specific and independent of legitimate
21 competitive differences relating to the use of particular
22 ports, routing and railroad network structure, and pricing.
23 Among other things, the dataset compiled by Dr. Marvel
24 examined international intermodal container movement for both
25 CSX and Norfolk Southern from 2009 to 2020 for approximately

1 29 carriers, and looked at revenues, costs, container origins
2 and destinations, and container size. That's discussed in
3 his initial report at Paragraphs 88 through 89, as well as in
4 his reply report at Paragraph 120. His model also calculated
5 and incorporated the proportion of container traffic both
6 railroads handled through major East Coast ports (including
7 Hampton Roads, the Port of New York and New Jersey, Savannah,
8 Charleston and Jacksonville). That is at Paragraph 91 of his
9 initial report. Also, Dr. Marvel calculated and incorporated
10 into his model the relative prices charged by the two
11 railroads on the lanes used by the carrier, thereby
12 accounting for differences in pricing for the same routes,
13 and that is at Paragraph 92 of his report. Ultimately, the
14 trier of fact will have to decide, but these steps arguably
15 account for the main competitive differences that Norfolk
16 Southern contends Dr. Marvel ignored. Nor has the Court
17 received any competing model and results accounting for such
18 differences within the confines of Dr. Marvel's damages
19 model. To the extent Dr. Marvel's model fails to account for
20 any routing advantage that Norfolk Southern has over the Belt
21 Line (and by extension CSX) at NIT, as previously noted, that
22 arguably goes to the heart of the pending dispute. Thus, it
23 appears that Dr. Marvel's damages regression model reliably
24 accounts for major explanatory variables. To the extent that
25 Norfolk Southern contends that other explanatory variables

1 (including issues relating to CSX's ability to service
2 traffic at Hampton Roads) play a role in the results
3 obtained, such criticisms go to the weight and not the
4 admissibility of Dr. Marvel's opinions and are for trial.
5 For that I cite the *Smith* case previously noted, 84 F.3d at
6 676 and '77. I also cite the *In re Linerboard Antitrust*
7 *Litigation* case at 497 F.Supp.2d at 678. Moreover, the fact
8 that Dr. Wright's critiques of Dr. Marvel's damages model
9 rely on significant changes to the models does not provide a
10 basis for excluding the latter, but is instead a matter for
11 trial. For that I cite *In re Urethane Antitrust Litigation*,
12 Page number 04-1616 at 2012 Westlaw 6681783 at *6, which is a
13 District of Kansas decision from 2012, which was affirmed by
14 the Tenth Circuit in 2014 at 768 F.3d 1245.

15 Finally, Dr. Marvel's deposition testimony that he
16 could not then think of literature supporting the use of his
17 model as constructed does not warrant exclusion. The use of
18 regression analysis as a tool in antitrust disputes has long
19 been recognized. For that I cite, for example, *In re Rail*
20 *Freight Fuel Surcharge Antitrust Litigation* at 292 F.Supp.3d,
21 Page 14, pinpoint cite 58, a District of Columbia decision
22 from 2017, which was affirmed in 2019 by the D. C. Circuit at
23 934 F.3d 619. I also cite *Conwood Company, L.P., versus U.S.*
24 *Tobacco Company*, 290 F.3d 763 at 793, a Sixth Circuit case
25 from 2002. Moreover, Dr. Marvel's report cites to literature

1 supporting the use of logistic regression modeling, and that
2 is at his initial report at Page 47, note 161.

3 Therefore, the Court declines to exclude
4 Dr. Marvel's opinions based on Norfolk Southern's arguments
5 that his analysis will always find damages and because they
6 fail to account for competitive differences.

7 That brings me to the Belt Line's motion to exclude
8 testimony from Dr. Marvel, which is ECF Number 473. The Belt
9 Line seeks to exclude Dr. Marvel's opinion on "railroad
10 operations" because he lacks expert or specialized knowledge
11 about the same. Belt Line posits that, "To the extent" that
12 Dr. Marvel intends to opine that: (a) Belt Line should not
13 have approved discontinuance of the so-called "diamond" track
14 in 2008; and (b), scheduling windows provided by Belt Line to
15 CSX for moving trains in 2015 to and from NIT were
16 inadequate...such opinions fall outside of Dr. Marvel's
17 expertise and should be precluded, and that is at Page 6 of
18 their filing. Notably, the portions of Dr. Marvel's report
19 cited by Belt Line did not contain the two recited opinions.
20 Instead, in Paragraphs 59 and 60 of his report, Dr. Marvel
21 opined that: (a) Norfolk Southern and Belt Line impeded
22 CSX's on-dock access by removing critical infrastructure,
23 namely, the diamond track in 2008; and (b) Norfolk Southern
24 impeded CSX's on-dock access to NIT in 2015 via its control
25 of scheduling and operational plans for trains moving to and

1 from NIT. There I cite his initial report, Paragraphs 59 and
2 60. The factual bases for these opinions are noted in
3 Dr. Marvel's report, and Belt Line does not challenge them in
4 arguing about Dr. Marvel's lack of railroad expertise. If
5 suitably factually predicated and the product of the
6 application of his economic expertise (as I'll discuss in a
7 moment), Dr. Marvel may opine as an economist about the
8 market for on-dock rail access at NIT and whether such
9 alleged acts were anticompetitive and interfered with CSX's
10 on-dock rail access at NIT. The Court, therefore, rejects
11 this argument.

12 Next I turn to switch rates. The Court denies Belt
13 Line's motion to exclude Dr. Marvel's opinions regarding the
14 reasonableness of Belt Line's switch rate, in all but one
15 respect. The Court addresses Belt Line's arguments one at a
16 time. First, to the extent that Dr. Marvel assesses
17 reasonableness by looking to negotiated contract rates for
18 switching services by terminal railroads, rather than public
19 tariff rates, the Court finds that such goes to the weight to
20 give to Dr. Marvel's testimony and opinions, not its
21 admissibility. In both instances, the service being
22 provided -- the switching of railcars by terminal
23 railroads -- is the same. Therefore, consideration of
24 contracted for switch rates at various ports and terminals
25 appears to speak to and is relevant to pricing in the context

1 of competition. Further, Dr. Marvel also identified other
2 public tariff rates for such switching services that were
3 less than Belt Line's public tariff switching rate. There I
4 cite Paragraph 54 of his initial report.

5 Second, Belt Line's complaint that Dr. Crowley's
6 approach of distilling the rate charged for purposes of
7 comparison to a per-container, per-mile fee for each railroad
8 better accords with the exercise of economic and railroad
9 expertise also goes to the weight and not the admissibility
10 of Dr. Marvel's opinions. As an initial matter, Dr. Marvel's
11 reports do discuss and analyze Belt Line's rates, both in
12 terms of per railcar, as well as in terms of an effective
13 rate per container, and there I cite Paragraph 54 of his
14 initial report and Paragraphs 60 through 64 of his reply
15 report.

16 Further, Dr. Marvel also cites the evidence (and
17 testified) that given the shorter distances traveled by
18 terminal railroads and the substantial fixed costs per
19 container, regardless of mileage, that consideration of
20 mileage was effectively unnecessary. That is at ECF Number
21 474-4 at Pages 24 and 25, as well as Paragraph 65 of his
22 reply report.

23 To the extent that Dr. Marvel also testified that
24 one way to make a proper comparison of terminal switch rates
25 between providers would have been to look at per-container

1 rates and consider economies of scale (relating to miles and
2 rates) and route and operational impediments, and
3 acknowledged that his analysis did not factor in scale
4 economies or route impediments, and that is at his deposition
5 cited at ECF 474 at Pages 25 and 26, this is fodder for
6 cross-examination and does not render his analysis unreliable
7 or unhelpful.

8 Belt Line's complaints regarding Dr. Marvel's
9 failure to consider Belt Line's costs in analyzing whether
10 its switching rate was reasonable presents a somewhat closer
11 question. Dr. Marvel's general characterization of Belt
12 Line's switching rate as "exorbitant," "extraordinarily
13 high," "strikingly" or "unduly high," "prohibitive," and the
14 like, at Paragraphs 13, 15 and 18, and 54 through 58 of his
15 initial report, and also in Paragraphs 2, 55 through 59 and
16 60 through 65 of his reply report, prompt the
17 question...relative to what? Dr. Marvel answers primarily by
18 reference to rates (public or contracted) for switching
19 charged by other terminal railroads, citing the same
20 paragraphs. Belt Line argues, however, that Dr. Marvel
21 needed, but failed, to consider Belt Line's costs in opining
22 about whether they were excessive, and this is at ECF Number
23 474 at 11 through 13. Dr. Marvel conceded, among other
24 things, that he did not analyze Belt Line's operational costs
25 or the incremental cost of a move on Belt Line's lines to

1 NIT, and did not have information to assess how the costs of
2 other terminal railroads impacted their switch rates. This
3 is at ECF number 474-4 at Pages 8, 12 and 17.

4 In response to Mr. Crowley's reporting on the Belt
5 Line's average operating expense per car, that's ECF Number
6 303 at 34, and his opinion that his railcar switching rate
7 was therefore reasonable, ECF Number 303-1 at Page 5,
8 Dr. Marvel's reply report suggests reframing the analysis and
9 poses as the relevant question whether Belt Line "could cut
10 its rates to its owners, CSX of Norfolk Southern, to a level
11 that would generate CSX container traffic and not make less
12 money doing so." That's Dr. Marvel's reply report at
13 Paragraph 57.

14 Dr. Marvel then opines that, as Belt Line appears to
15 be covering its current costs with existing traffic, and
16 because the marginal cost of handling additional traffic will
17 necessarily be less than its current average costs, it would
18 be unreasonable to charge a price per car sufficient to cover
19 current average costs, as those costs would decline with
20 additional traffic. That also cites to Paragraph 57. He
21 further opines that Mr. Crowley's analysis itself reveals the
22 feasibility of a Belt Line rate cut per CSX, and doing so as
23 proposed by CSX in 2018 would have generated substantial
24 additional net revenue for Belt Line, and that's in Paragraph
25 58.

1 The Court concludes that, notwithstanding Belt
2 Line's argument about the validity of Dr. Marvel's opinions
3 about the nature of Belt Line's rate, the metric he used to
4 assess Belt Line's switch rate is based on sufficient facts
5 and data and will assist the trier of fact in assessing that
6 rate. One measure of the reasonableness of the switch rate
7 is what others in the same industry are charging to provide a
8 similar service. To be sure, other measures exist, including
9 those that assess the rates charged in relation to the
10 provider's costs. Dr. Marvel's failure to assess Belt Line's
11 costs, however, goes to the weight, not the admissibility of
12 his opinions and testimony on this point. To avoid
13 misleading or confusing the trier of fact about his analysis,
14 however, the Court grants Belt Line's motion in one limited
15 respect. Specifically, Dr. Marvel is precluded from
16 generally characterizing Belt Line's switching rate as
17 exorbitant, strikingly or unduly high, extraordinary,
18 prohibitive, or the like. That is neither relevant nor
19 helpful. Instead, Dr. Marvel is limited to opining about
20 Belt Line's rates only in relation to the switching rates
21 described in his reports. For example, he may opine that the
22 Belt Line switching rate is extraordinarily high in relation
23 to the rate charged by Commonwealth Railway to CSX for
24 switching Services. In all other respects, Belt Line's
25 motion regarding Dr. Marvel's opinions about the switch rate

1 is denied.

2 Next up is the diamond track.

3 The Court grants Belt Line's motion to exclude
4 Dr. Marvel's opinions on the removal of the "diamond" track
5 or interchange.

6 In his initial report, Dr. Marvel opined that
7 "Norfolk Southern and Belt Line have impeded CSX's on-dock
8 access to NIT by removing critical infrastructure." That's
9 at Paragraph 59. Dr. Marvel describes the infrastructure in
10 question as the 2008 discontinuance of Norfolk Southern's
11 service and Belt Line's trackage rights between the "Norfolk
12 Southern juncture" and the "Carolina juncture" referred to as
13 the "diamond." That quotes the same paragraph. In his reply
14 report, Dr. Marvel also refers to the decommissioning of
15 these rail lines (and the destruction of the diamond
16 interchange) as one of several "anticompetitive actions"
17 taken by Norfolk Southern and the Belt Line, and that is his
18 reply report in Paragraphs 2 and 10 through 11. In so
19 opining, Dr. Marvel primarily relied upon the declaration of
20 CSX's Robert Girardot, ECF Number 367-1. That declaration
21 describes what the diamond interchange was, the fact that its
22 use was discontinued in 2008 and the track removed, and that
23 subsequent route to be used by Belt Line and CSX for
24 accessing NIT was via Norfolk Southern's Portlock Yard and
25 was longer and less efficient than the diamond connecting

1 line, and created the potential for long delays for CSX due
2 to its conflicts with Norfolk Southern's trains and Norfolk
3 Southern's likely prioritization of their movement. That's
4 at Paragraph 7 of that declaration.

5 At deposition, when reviewing the bases for his
6 opinions, Dr. Marvel testified that: (a) he wanted to know
7 more about how and why the use of the diamond interchange was
8 discontinued or was no longer in play; (b) that he did not
9 have a full understanding of the issue and had asked lawyers
10 for information about it; (c) he did not know whether CSX or
11 the Belt Line had used the diamond interchange to access NIT;
12 and (d) he just knew that it had been destroyed. That is ECF
13 Number 474-4 at Pages 13 and 14 and 18 and 19. Dr. Marvel
14 also testified that, "If it is found to be correct that this
15 was destroyed to impair access, it would be a classic example
16 of...disruptive competition...in an anticompetitive fashion."
17 That is at the same cite at Page 14.

18 This deposition testimony reveals that Dr. Marvel's
19 opinion classifying acts pertaining to the diamond
20 interchange as anticompetitive is little more than
21 *ipse dixit*. Mr. Girardot's declaration describes the effects
22 of the discontinuance of the diamond interchange but provides
23 few details about the events leading to that decision.
24 Moreover, Mr. Girardot himself testified that, prior to the
25 removal of the diamond interchange, Belt Line did not move

1 any revenue traffic for CSX. That's at ECF Number 303-10 at
2 Page 3. Further, when Belt Line's board of directors
3 considered and agreed to the proposal to release its trackage
4 rights to the diamond interchange, there is no evidence that
5 even the directors from CSX objected to the same, and that is
6 at ECF 303-11 at 5. And at the hearing on Belt Line's
7 motion, counsel for CSX agreed that there was no objection
8 that was lodged. For his part, Dr. Marvel asked for but
9 apparently received no information about and conducted little
10 to no investigation into those events on its own. With
11 proper predication, Dr. Marvel may opine as a qualified
12 economist as to whether to classify certain acts as
13 anticompetitive or legitimate competition. But here,
14 Dr. Marvel's opinion lacks a sufficient factual or other
15 basis in data as a necessary predicate. And for that, I cite
16 the *Sardis versus Overhead Door Corporation* decision of the
17 Fourth Circuit from 2021 at 10 F.4th 268 at page 291.
18 Dr. Marvel's speculative opinion that the discontinuance of
19 the diamond interchange (and the ensuing track removal) was
20 an anticompetitive act that impeded CSX's access to NIT is
21 unreliable and unhelpful to the trier of fact. Accordingly,
22 the Court grants Belt Line's motion to preclude him from so
23 testifying.

24 Next we discuss the scheduling window.

25 Belt Line also attacks Dr. Marvel's opinion

1 identifying Norfolk Southern's acts in allegedly "preventing
2 [Belt Line] from switching CSX trains in and out of NIT by
3 denying...the required scheduling windows" as another
4 anticompetitive act, and this is in his initial report,
5 Paragraphs 18 and 60.

6 Belt Line asserts that this opinion is not supported
7 by the facts, which show that a scheduling window to move
8 CSX's trains had been established and that Belt Line moved
9 all of the traffic CSX had and was prepared to do more, but
10 CSX did not make any such requests, and that is at Page 17 of
11 their motion. Having reviewed the parties' submissions, the
12 Court finds that the facts underlying Dr. Marvel's opinion
13 about the 2015 events are disputed. Some facts do exist
14 which support Dr. Marvel's opinion that Norfolk Southern's
15 activities at the time impeded CSX's efforts to utilize Belt
16 Line's services for on-dock rail access to NIT. Further, the
17 undersigned declines the defendant's invitation to read the
18 Court's summary judgment ruling, which addressed CSX's
19 damages and state law claims and not matters of injunctive
20 relief, as precluding Dr. Marvel from opining regarding the
21 2015 conduct. See ECF Number 566 at Page 8. Therefore, the
22 Court denies Belt Line's motion to exclude this opinion.

23 Lastly, that brings us to the matter of drayage.

24 Belt Line also challenges the admissibility of
25 Dr. Marvel's opinion that drayage is not an adequate

1 substitute for on-dock rail access to NIT, contending that
2 his analysis is unreliable and insufficient for failure to
3 consider the subsidies CSX receives to dray. Belt Line
4 contends that CSX's decision to dray containers from NIT,
5 rather than using the rails, is driven by the fact that
6 drayage is cheaper than utilizing rail by the Belt Line.

7 In part, Belt Line's arguments about drayage rests
8 upon its contention that Dr. Marvel's conclusion about the
9 adequacy of drayage as a substitute is simply incorrect. The
10 Court's task in addressing a *Daubert* challenge, however, is
11 not to decide whether an expert's opinion is correct but to
12 assess the relevance and reliability, and for that I cite the
13 Fourth Circuit decision from 1999, *Westberry versus Gislaved*
14 *Gummi AB* at 178 F.3d 257 at Page 261. Belt Line's challenge
15 also raises questions about CSX's true rationale for using
16 one form of transportation to move containers to and from
17 NIT, which is a matter for trial.

18 In discussing the relevant market and whether to
19 include drayage, Dr. Marvel notes that any price comparison
20 between rail and drayage must be at the competitive price
21 level, rather than at Belt Line's allegedly inflated rail
22 switching rate resulting from anticompetitive acts, and
23 that's at Paragraph 49 of his initial report. Dr. Marvel
24 acknowledges that drayage competes at the margin with rail at
25 the alleged anticompetitive rate but asserts that when

1 considering switching rates at the competitive level, rail is
2 a significantly improved and more efficient option, such that
3 drayage is not a competitive alternative. He also opines
4 that non-price factors, including the general recognition of
5 the inferiority of drayage compared to the efficiency of rail
6 access, market preference for rail access, regulatory and
7 other difficulties associated with draying containers from
8 NIT to CSX's yard in Portsmouth, and capacity issues,
9 demonstrate that drayage is an inferior and unviable
10 substitute for moving containers to and from NIT via on-dock
11 rail. Thus, Dr. Marvel opines that the two services are
12 neither functionally interchangeable nor easily substituted
13 for one another without undue expense, delay, and
14 inconvenience because, when given a genuine choice between
15 the two and in light of the unique situation at NIT, a
16 customer will not substitute drayage for rail service. Here
17 I cite the *FTC versus Sysco Corporation* case at 113
18 F.Supp.3d, Page 1, at Page 25. That is a District of
19 Columbia trial court decision from 2015 which (discusses
20 functional interchangeability and cross-elasticity of
21 demand). The subsidization of drayage to make it at least
22 tolerable to customers, as described by a VIT witness,
23 Dr. Marvel opines, does not transform it into a suitable
24 substitute for rail for purposes of relevant market analysis.
25 To the extent that Dr. Wright and Mr. Crowley reach different

1 conclusions, Dr. Marvel sufficiently responds to them in his
2 reply report. As Dr. Marvel's analysis is sufficiently based
3 on facts and data that he reliably applies to opine about
4 drayage, Belt Line's motion to exclude Dr. Marvel's opinion
5 about the same is denied.

6 That is the Court's ruling on the motion *in limine*
7 directed to Dr. Marvel, and that brings me to the two motions
8 *in limine* regarding the exclusion of use of internal Norfolk
9 Southern e-mails, which are ECF Number 337 and ECF Number
10 349.

11 Norfolk Southern's motion *in limine* regarding the
12 use of internal e-mails, and the Belt Line's motion *in limine*
13 to exclude evidence and argument regarding the use of
14 internal e-mails, are denied without prejudice.

15 As outlined in the opinion and order addressing
16 defendants' motions to dismiss, ECF Number 66, at Pages 28
17 through 34, some related corporations have a sufficient unity
18 of interest such that they are incapable of entering into an
19 antitrust conspiracy, and for this, I cite the *Copperweld*
20 *Corporation versus Independence Tube Corporation* case at
21 467 U.S. 752 at Pages 770-71, a 1984 case from the Supreme
22 Court, as well as a Ninth Circuit case from 2003, which is
23 *Freeman versus San Diego Association of Realtors*, 322 F.3d at
24 1133, pinpoint cite 1146. Whether two corporations share a
25 unity of interest is a factual determination that is reserved

1 to the trial judge.

2 In addition, the Court has recognized that CSX may
3 rely on direct and circumstantial evidence to prove a
4 conspiracy, ECF Number 559, at 93, (citing *Robertson versus*
5 *Sea Pines Real Estate Companies, Incorporated*, at
6 679 F.3d 278, Pages 289-90, which is a Fourth Circuit case
7 from 2012 which states, ("Conspiracies are often tacit or
8 unwritten in an effort to escape detection, thus
9 necessitating resort to circumstantial evidence to suggest
10 that an agreement took place.)"

11 Further, defendants' arguments would not preclude
12 admission of these e-mails to prove the Sherman Act,
13 Section 2, unlawful monopoly claims, which remain viable
14 following the Court's ruling on summary judgment. In fact,
15 Norfolk Southern indicated it was not seeking to prevent CSX
16 from using e-mails for this purpose, and that is at ECF
17 Number 442 at Pages 6 through 7.

18 So that concludes the Court's rulings on those four
19 motions. I will enter a brief order memorializing those
20 rulings, and I think that leaves us with our restarting the
21 Final Pretrial Conference, then, tomorrow morning at
22 9:00 a.m.

23 Unless there's anything further, I look forward to
24 seeing you all tomorrow morning.

25 MR. McFARLAND: Thank you, Your Honor. This is

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41

1 Robert McFarland for CSX, and we will be there bright,
2 earlier, and bushy-tailed.

3 MR. LACY: Your Honor, Michael Lacy for Norfolk
4 Southern. We will see you in the morning.

5 MR. SNOW: Yes, sir. This is Ryan Snow. We'll see
6 you in the morning. Thank you, Your Honor.

7 THE COURT: Thank you. Court will be in recess.

8 (Hearing adjourned at 4:40 p.m.)

9 CERTIFICATION

10
11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled matter.

13
14
15 X _____/s/ _____x

16 Jody A. Stewart

17 X _____1-11-2023 _____x

18 Date

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25
JODY A. STEWART, Official Court Reporter

REDACTED - TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

EXHIBIT 4

VPA COMMENTS FILED IN EP 711 (SUB-NO. 2)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 7, 2023
Part of
Public Record

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Ex Parte 711 (Sub No. 2)

COMMENTS OF THE VIRGINIA PORT AUTHORITY

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November 7, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Ex Parte 711 (Sub No. 2)

COMMENTS OF THE VIRGINIA PORT AUTHORITY

The Virginia Port Authority (“VPA”) hereby submits these comments regarding the proper scope of the Surface Transportation Board’s (“STB”) September 5, 2023, Notice of Proposed Rulemaking in *Reciprocal Switching for Inadequate Service*, Ex Parte 711 (Sub No. 2) (“2023 NPRM”). The VPA is grateful for the opportunity to provide these comments to the STB to ensure that port facilities are eligible for the relief that the proposed rule would provide. Specifically, the VPA requests that the STB modestly expand the categories of parties eligible to avail themselves of the proposed rule by including port facilities (or portions of port facilities) that are served by only one Class I railroad (or affiliates). In addition, the VPA requests that the STB make several conforming changes that would be necessary to ensure that ports are eligible petitioners, namely: permitting ports to request performance data; ensuring that belt or other railroads under the control of a Class I railroad are included as affiliated companies for purposes of determining whether a port facility is served by only one Class I railroad; declaring that ports are terminal areas; and ensuring that port congestion and inefficiency resulting from railroad service can be addressed regardless of commodity exemptions or contracts.

I. VPA Background: The Port of Virginia and International Intermodal Freight Are Important to the U.S. Economy

The Commonwealth of Virginia established the VPA in 1952 to foster maritime commerce and economic development within Virginia by coordinating and promoting the port activities of three Virginia city-owned marine terminals, namely, Newport News, Portsmouth, and Norfolk. In the 1970s, those city-owned marine terminals were consolidated under the VPA to further bolster their economic development potential, and in the 1980s, terminal operations were consolidated through the formation of Virginia International Terminals, LLC (“VIT”), which is a single-member limited liability company wholly-owned by the VPA. Together, the VPA and VIT do business as The Port of Virginia (“POV”). The POV consists of four deep-water marine terminals: Norfolk International Terminals (“NIT”), Portsmouth Marine Terminal (“PMT”), Virginia International Gateway (“VIG”), and Newport News Marine Terminal (“NNMT”). POV also has two inland terminals: Richmond Marine Terminals (“RMT”) and Virginia Inland Port (“VIP”). For a map of the VPA terminal area, see Exhibit A attached hereto.

The VPA is capitalizing on a differentiated operating platform appropriately named the *Virginia Model*. Unlike most ports, the VPA is not a “landlord” port. Rather, it both owns, or leases, *and* operates all of the container terminals in the Norfolk Harbor. Thus, the decision-making for optimal utilization of the terminals, technology, and equipment gives the port unparalleled control and flexibility. The result is swift implementation of changes and customer-focused solutions tailored to help both shippers and their logistics partners create more reliability in the supply chain.

VPA has many benefits, including:

- By the end of 2025, POV will have the deepest, widest, obstruction-free shipping channels on the US East Coast. (There is an effort underway to deepen the port's channels to 55 feet and widen them to accommodate two way vessel traffic.)
- Capable of handling 18,000+ TEU vessels.
- Direct service to 45+ countries worldwide.
- Service offered by every major shipping line.
- Geographic centrality: access to two-thirds of the U.S. population within a day's drive of POV.
- Fast and efficient on-dock rail connections to key inland markets.
- Lowest pilferage rate on the East Coast.
- Leader in quality, efficiency, and environmental management practices: The VPA was the nation's first to implement an ISO 14001-approved environmental standards program.
- State-of-the-art container and break bulk facilities.

POV is the sixth-largest and one of the fastest growing ports in the country. The port's reach extends throughout the Mid-Atlantic and into the Ohio Valley and Midwest, with 36% of its cargo moving by rail, handling the largest rail volume on the East Coast and serving American farmers and manufacturers throughout the heartland of our nation. Annually, POV supports nearly 1.3 million jobs paying almost \$90 billion in salaries and wages and more than \$340 billion in total spending across the country. Of equal importance, Virginia is one of the nation's 17 strategic ports

and handles more military support cargo than any port in the U.S.¹ In FY 2022, POV moved more than 25 million tons of freight and more than 3.6 million TEUs.²

An important element of the POV's offering to customers is rail service that allows reach to import markets in Chicago and the Ohio Valley in less than two days. Prior to 1898, industries in the area, including a myriad of marine terminals, were served by eight railroads. In 1898, the Norfolk and Portsmouth Belt Line Railroad ("NPBL") was formed by these railroads with shares held by each of the interested railroads as a means to improve the level of service for all the rail customers in the terminal area. Since that time, multiple mergers occurred that resulted in NPBL having only two owners—Norfolk Southern ("NS") and CSX Transportation ("CSX").³

For our purposes here, it is useful to provide an overview of how rail service works at NIT. NIT is directly rail-served by NS. CSX can move traffic to NIT, but only by interchanging cars to NPBL, which historically has been *de facto* controlled by NS and has been its affiliate, although NS never obtained authority from the Interstate Commerce Commission or STB to control NPBL.⁴

¹ Fiscal Year (FY) 2022 was a banner year for imports at the VPA. During FY 2022, the imported containerized tonnage increased by 3% at the Port of Los Angeles, 9% at the Port of Savannah, and 15% at the Port of New York, while imported containerized tonnage increased by 23% at the Port of Virginia. *Id.* at 5. That same year, the VPA's land and barge transportation cargo was 64 % by truck, 32 % by rail, and 4% by barge. *Id.* at 6

² K. Scott Swan, Ph.D., *The Fiscal Year 2022 Virginia Economic Impacts of the Port of Virginia*, PORT OF VIRGINIA, Apr. 26, 2023 at 4, <https://wp.portofvirginia.com/wp-content/uploads/2023/05/FY-2022-VIRGINIA-ECONOMIC-IMPACTS-042823.pdf> (last accessed Oct. 30, 2023).

³ There are three short line railroads that also operate in the Hampton Roads area: Commonwealth Railway (CWRY), Chesapeake & Albemarle Railroad (CA), and the Bay Coast Railroad (BCR).

⁴ The STB ruled in 2022 that NS did not acquire control of NPBL because NS did not list NPBL as an "affiliated company" when it sought control authority when Norfolk & Western merged with Southern Railway. *Norfolk Southern Ry. Co. – Petition for Declaratory Order*, STB FD 36522 (served June 17, 2022).

Both NNMT and RMT are subject to the same single-served issue – CSX is the only Class I railroad that has access. This arrangement introduces additional operations and costs for POV and shippers to move rail cargo through the port.⁵ Railroad competition at these facilities would create service advantages for the shippers.

POV works hard to be an important part of the national intermodal system for the benefit of the shippers, the economy of Virginia, and the nation, and would welcome the opportunity to provide even greater levels of service with better, reliable, and more consistent rail service.

II. The STB Should Expand the Definition of Eligible Petitioners to Include Ports

The STB has appropriately focused its proposed rulemaking on shippers and receivers of freight, but should modestly expand the scope to include ports and port facilities.

A. Ports Should Be Eligible Petitioners Because—Like Shippers and Receivers—They Are the Origin or Destination of the Rail Movement and Experience the Same Negative Effects of Poor Rail Service

As drafted, the 2023 NPRM seems to focus on eligible petitioners who are “shippers and receivers” in a terminal area: “The newly proposed regulations would provide for the prescription of a reciprocal switching agreement when service to a terminal-area *shipper or receiver* fails to meet certain objective performance standards.” 2023 NPRM at 2 (emphasis added); *see also id.* n.14. With that eligibility, shippers and receivers in a rail terminal area are entitled to require the serving railroad to provide it certain data on service performance. *Id.* (“[T]he Board proposes to require Class I rail carriers to provide, upon written request by a shipper or receiver, that

⁵ Two other parts of the POV facilities are served by other railroads. Virginia International Gateway (“VIG”) is served by a short line railroad, the Commonwealth Railway. Meanwhile, Portsmouth Marine Terminal (“PMT”) is dual-served by CSX directly and by NS via the NPBL.

customer’s own individualized service data.”). After following the processes set forth in the NPRM, those shippers or receivers could then initiate a proceeding against the Class I carrier under the proposed rule if certain service conditions are met. The rationale expressed for this new rule is that “[t]he proposed standards are intended to reflect a minimum level of rail service below which regulatory intervention may be warranted, considering *shippers and receivers*’ need for reliable, predictable, and efficient rail service as well as rail carriers’ need for a certain degree of operating flexibility.” *Id.* (emphasis added).

Under this same rationale, ports should also be eligible to petition for the relief provided by the proposed rule. Ports have a similar “need for reliable, predictable, and efficient rail service.” Ports work directly with railroads. In effect, a port is the originator or terminator of traffic because every rail movement to a port either starts or ends at the port regardless of who the shipper or receiver [of cargo] is. From an operating perspective, there is no difference between a shipper or receiver and a port because the port is the origin or destination of the rail shipment, just as the shipper is the origin and the receiver is the destination for other rail shipments.

Ports experience the same effects of poor rail service that a shipper or receiver experiences. Ports and shippers have an interest in quality railroad service to prevent port congestion. Poor rail service can result in a port being clogged and negatively impacting shippers and receivers alike.⁶ As seen in recent years, poor rail service at West Coast ports created operational issues within the port facility when container dwell times dramatically increased and most of the ports’ land capacity

⁶ Caitlin Harrington, *A US Freight Rail Crisis Threatens More Supply-Chain Chaos*, WIRED, Aug. 30, 2022, <https://www.wired.com/story/a-us-freight-rail-crisis-threatens-more-supply-chain-chaos/> (last accessed Oct. 30, 2023).

was occupied.⁷ Similarly, on May 13, 2022, the U.S. Department of Transportation reported on an example of rail congestion affecting some ports:

For key rail lines, train speed is down and trains are spending more time delayed at terminals. This breakdown in rail service is making it more difficult to clear the docks at Ports of Los Angeles and Long Beach: the number of trucking containers that have been on the docks for nine days or more is lower than ever at the Port of Long Beach but the number of long-dwelling rail containers is breaking new records each week.⁸

Thus, there is no doubt that the quality of rail service affects port operations and efficiency of freight movements to and from ports.

A port sits at the beginning or ending of a rail intermodal movement and has the exact same need for reliability, predictability, and efficiency as any shipper or receiver. The STB's narrow proposed eligibility therefore fails to capture the full set of players impacted by poor rail service⁹ and should therefore be modestly expanded to include ports.

B. Any Portion of a Port Facility That Is Served By Only One Class I (and Its Affiliates) Should Be Eligible

In addition, the STB should allow a port to be eligible as to any portion of a port that is served by a single Class I rail carrier. This scope would be consistent with the STB's definition of "practical physical access" and the proposal's coverage of even a single lane that meets the requirements of the proposed rule. 2023 NPRM at 23 (defining "practical physical access" as "a

⁷ Lori Ann LaRocco, *Railroad Bottleneck at West Coast Ports Reaches Inflection Point*, CNBC, Jul. 8, 2022, <https://www.cnbc.com/2022/07/08/railroad-bottleneck-at-west-coast-ports-reaches-inflection-point.html> (last accessed Oct. 30, 2022).

⁸ *USDOT Supply Chain Tracker Shows Historic Levels of Goods Coming into U.S., Continued Challenges with Congestion*, U.S. DEP'T OF TRANSP., May 13, 2022, <https://www.transportation.gov/briefing-room/usdot-supply-chain-tracker-shows-historic-levels-goods-coming-us-continued-challenges> (last accessed Oct. 30, 2023).

⁹ The "the petitioner would need to be a shipper or receiver. . . . the Board proposes to limit eligible petitioners to shippers and receivers." 2023 NPRM at n.14.

feasible shipping opportunity on a rail carrier, whether directly or through that carrier’s affiliated company,” and explaining that “[a] petitioner could have practical physical access to more than one Class I carrier (for the lane of traffic that is the subject of the petition) by any of several means”).

Like shippers and receivers, ports may have some facilities that are served by multiple Class I railroads and other facilities that are served by only one. In some instances, a port may lack “practical physical access” because the entire port is served by a single Class I railroad or its affiliate. In other instances, a port may in total be served by multiple carriers, but certain facilities at the port may be served by a single rail carrier. For example: POV, in the general sense, is served by both of the East’s Class I rail carriers, but there are individual POV terminals that are only served by a single Class I railroad.

These individual port facilities that are sole-served by a Class I railroad should be considered not to have “practical physical access” from multiple Class I railroads (or affiliates). This assessment would be consistent with the STB rationale to consider a lane independently “even if other lanes at the [shipper or receiver] facility had practical physical access to another carrier.” 2023 NPRM at 23.

III. Other Elements of the 2023 NPRM Should Account for Ports As Eligible Petitioners

Once the 2023 NPRM definition of Eligible Petitioners is expanded to include ports, the following changes will provide for the most effective rule implementation:

- Permit ports to request railroad performance data for movements to or from the port;
- Clarify the definition of “affiliated companies” to specifically include belt railroads in which a Class I carrier has controlling authority—which, for POV, will ensure adequate coverage;

- Specifically defining ports as “Terminal Areas”; and
- Remove contractual exemption relief under this Rule.

First, and most importantly, ports, as eligible petitioners, should be entitled to ask for railroad performance data for movements to and from the port—just like shippers and receivers. Today, ports have limited access, if any, to railroad performance data within the port terminal. Access to such data, and requiring railroads to provide it upon request as outlined in the proposed rule, would increase transparency on rail service to ports.¹⁰

Second, the STB should confirm that “affiliated companies” includes belt railroads controlled by one Class I carrier. Under the proposed rule, an eligible entity (which POV suggests should include ports) must be served by a single Class I railroad or an affiliated company of a Class I railroad to avail itself of the relief provided. The 2023 NPRM noted that “[f]or purposes of this NPRM and the proposed regulatory text, ‘affiliated companies’ has the same meaning as ‘affiliated companies’ in Definition 5 of the Uniform System of Accounts (49 C.F.R. part 1201, subpart A).” 2023 NPRM at n.9.

The STB should take guidance from its existing definitions of key terms, which leads to the clear conclusion that affiliated companies include such railroads that are controlled by a Class I. 49 C.F.R. Part 1201, Subpart A (5)(a) says: “[a]ffiliated companies means companies or persons that directly, or indirectly through one or more intermediaries control, or are controlled by, or are

¹⁰ In footnote 40, the STB requested comments on whether the STB could require a carrier to disclose data about past service to a shipper or receiver when a different entity paid for the service. 2023 NPRM at n.40. The STB adopted the requirements for railroads to report operating metrics pursuant to 49 U.S.C. §11321 and 49 U.S.C. §11145. Neither of those statutes place a limit on the STB’s ability to use or make public that data. Indeed, for a port to avail itself of this rule, it would need access to this information because—although directly affected by poor railroad service with downstream effects on commerce—the port is not the payor of freight.

under common control with, the accounting carrier.” Further, 49 C.F.R. Subpart A (5)(b) defines control:

Control (including the terms *controlling*, *controlled by*, and *under common control with*) means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority of minority ownership or voting of securities, common directors, officers or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means.

Under these definitions, affiliated companies that are controlled by a Class I railroad should be considered to *be* the Class I railroad.

Considering an affiliated company to be the alter ego of the Class I railroad that controls it is significant to POV because NIT is served by NPBL; NS has, in recent times, exercised control over NPBL. In 2022, however, the STB ruled that NS has not been authorized to control NPBL and instructed NS to take remedial action.¹¹ If NPBL is controlled by NS (and therefore an “affiliate carrier” of NS), then NIT would be served only by a single Class I railroad while RMT and NNMT are served by only CSX.¹²

Third, the STB should declare that ports in rail terminal areas are rail terminals under this rule, which is consistent with operations and precedent. In the 2023 NPRM, the STB noted that: “[s]ubject to the foregoing definition, a particular point of loading/unloading would not be the appropriate subject of a prescribed reciprocal switching agreement under part 1145, if the point is

¹¹ *Norfolk Southern Ry. Co. – Petition for Declaratory Order*, STB FD 36522 at n.25 (served June 17, 2022), *aff’d Norfolk Southern Ry. Co. v. STB*, 72 F.4th 297 (D.C. Cir. 2023) (“Given this decision, the Board expects the parties to take appropriate steps to address the unauthorized control issue immediately following resolution of the district court proceeding, including any appeals.”). NS has not taken that remedial action to date.

¹² On the other hand, if NPBL is not controlled by NS, then CSX would likely gain better access to NIT.

not, or using existing facilities reasonably could not be, integrated into the terminal area operations.” 2023 NPRM at 12. Port facilities are often in rail terminal areas because they are in “a commercially cohesive area in which two or more rail carriers undertake the local collection, classification, and distribution of shipments for purposes of line-haul service.” 2023 NPRM at 11-12.

Indeed, ports are not only in rail terminal areas, they are often themselves rail terminal areas. Multiple cases have discussed rail terminal switching and other rail services in port areas when applying the Interstate Commerce Commission Termination Act.¹³ Going back further, ports were held to be rail terminal areas under Section III of the Interstate Commerce Act, which section applied to motor carrier regulation.¹⁴ Accordingly, ports are rail terminal areas and are the appropriate subject of a prescribed reciprocal switching order under the proposed rule.

Fourth and finally, POV addresses two remaining issues raised by the STB in the 2023 NPRM—exempt commodities and contract traffic. Although international intermodal shipments are exempt from regulation, the STB correctly notes that an exemption may be revoked. If a service issue were severe enough for a port to petition the Board under these new reciprocal switching rules for inadequate service, that petition should not be barred by an exemption. Given the VPA’s interest in adequate rail service to maintain port fluidity and competitiveness, it should

¹³ *Golden Isles Terminal Railroad, Inc.--Trackage Rights Exemption--CSX Transportation, Inc.*, STB FD 34432 (served Nov. 12, 2003) (discussing providing “terminal switching and service to customers” in port terminal area); *Brownsville & Rio Grande International Railway, LLC--Change In Operator Exemption Including Interchange Commitment--Brownsville & Rio Grande International Railroad*, STB FD 35863 (served July 21, 2014) (describing port as a terminal area).

¹⁴ *Sea-Land Service, Inc. v. United States*, 222 F.Supp. 558 (D. Del. 1963) (declaring a port a terminal area under Section III of Interstate Commerce Act).

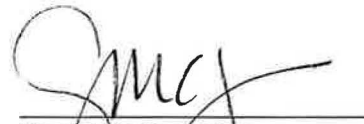
not matter whether a shipper had a contract with the rail carrier in instances in which a port seeks relief under the proposed rule.

IV. Conclusion

POV appreciates the opportunity to comment on the proposed rule, which could be improved by:

- Including ports as eligible parties in addition to shippers and receivers, for any portion of a port facility that is served by only one Class I railroad or its affiliated companies.
- Ensuring that belt or other railroads under the control of a Class I railroad are included as affiliated companies for purposes of determining whether a port or portion of a port is served by only one Class I railroad.
- Permitting ports to request performance data like shippers and receivers.
- Declaring that ports are terminal areas.
- Ensuring that port congestion and inefficiency resulting from railroad service can be addressed regardless of commodity exemptions or contracts.

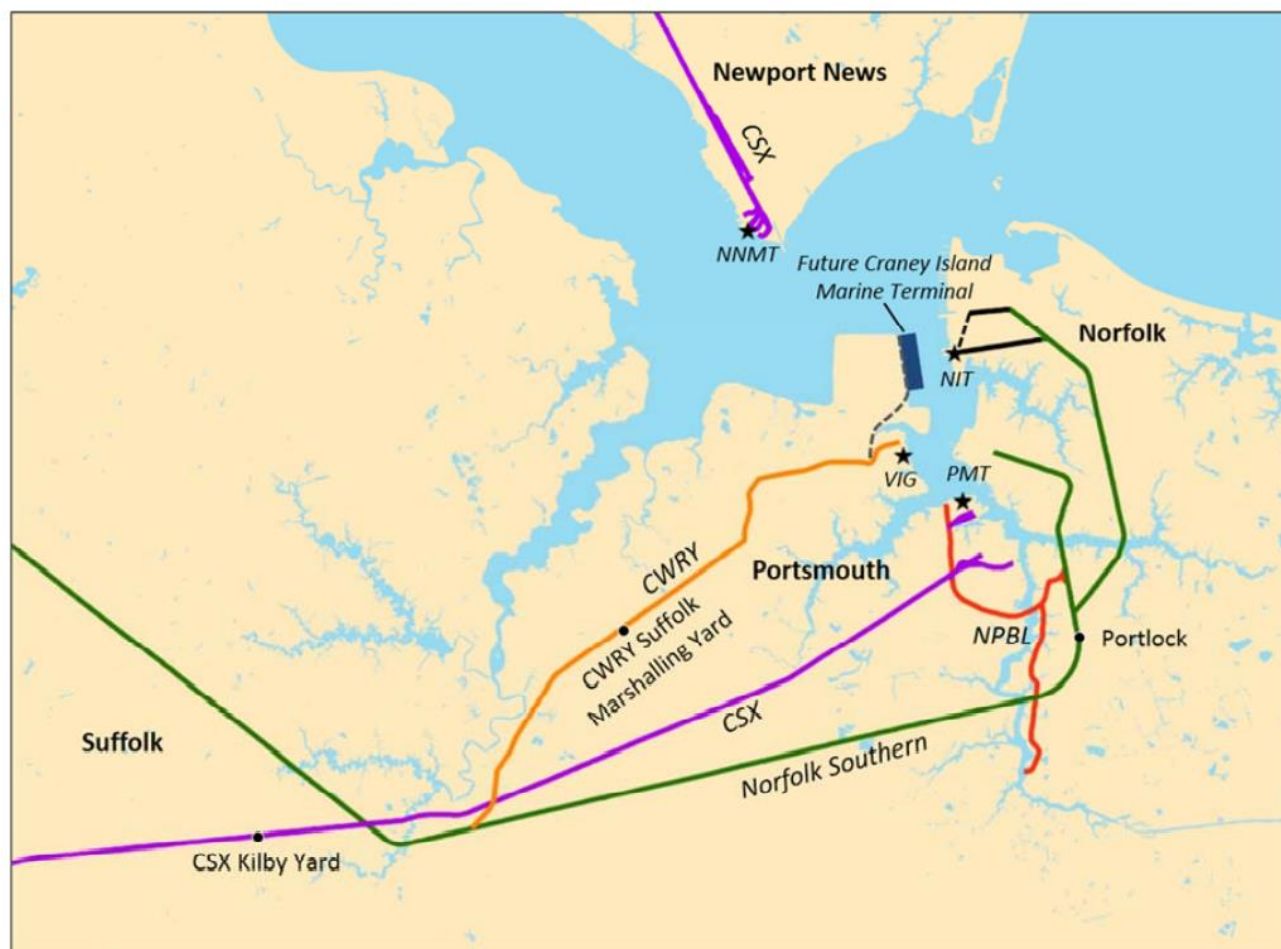
Respectfully Submitted,



Sarah McCoy, Esq.
Brianna Barnes, Esq.
Virginia Port Authority
101 W Main St.
Norfolk, VA 23510
(757) 683-8000

November 7, 2023

**COMMENTS OF THE PORT OF VIRGINIA
EXHIBIT A**



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

EXHIBIT 5

LETTER FROM VPA TO NPBL

{



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

VERIFIED STATEMENT OF MARYCLARE KENNEY

VERIFIED STATEMENT OF MARYCLARE KENNEY

My name is Maryclare Kenney. I am Vice President of Intermodal and Automotive for CSX Transportation, Inc. (“CSXT”).

My role as Vice President of Intermodal and Automotive includes responsibility for overseeing CSXT’s sales and marketing functions in service to intermodal customers, as well as customers producing and transporting finished vehicles and auto parts domestically and internationally. I joined CSXT in 2011 and have held roles of increasing responsibility, which includes approximately twelve years in intermodal.

I am familiar with the operations at all of CSXT’s intermodal terminals, including Norfolk International Terminals (“NIT”), one of the most important port terminals on the Eastern Seaboard and the Gulf Coast, and one of the top five individual marine terminals on the East Coast and Gulf Coast in terms of rail container throughput. I am also familiar with the ongoing efforts by Norfolk Southern Railway Company (“NSR”) and Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”) to exclude CSXT from accessing NIT, and the adverse impacts of that conduct. I participated in CSXT’s due diligence and analysis related to its antitrust lawsuit in federal district court regarding the anticompetitive conduct by NSR and NPBL, and I have helped shape CSXT’s strategy to achieve competitive access to on-dock rail at NIT.

The purpose of this Verified Statement is to address the claim made by NSR in its application, filed on February 14, 2025, that the Surface Transportation Board (“STB” or “Board”) should treat NSR’s request for authority to control NPBL as a “minor” transaction because, according to NSR, “[t]his Transaction clearly will not have any anticompetitive effects.” (Appl. 7.) CSXT strongly opposes NSR’s request for authority to control NPBL, and we will address the merits of NSR’s request for control authority at the appropriate time. In this

Verified Statement, I address NSR's frankly absurd claim that there are no competitive issues raised by the requested authority that need to be addressed and therefore the STB should fast-track the application by treating it as a "minor" transaction.

1. NSR's unlawful control of NPBL has had, and is continuing to have, adverse effects on competition.

NSR states plainly that "[t]he critical point to bear in mind is that NSC and/or NS have had effective control over NPBL for more than 42 years." (*Id.* at 7-8.) While that may be true, it is also the heart of the problem. NSR had no right or authority to control NPBL for all of those years, but NSR did it anyway. CSXT has theoretical rail access to NIT through NPBL, which was created to ensure that its owners would have access to facilities in the Norfolk area, but NSR has unlawfully used its control over NPBL to exclude CSXT from accessing NIT. NSR's long history of unlawful conduct resulted in a clear and effective restraint on competition that NSR now wants the STB to permit going forward.

The evidence of the adverse effects of NSR's long-running unlawful conduct is clear. NIT is one of the most important intermodal terminals on the Eastern Seaboard and the Gulf Coast, but CSXT has *zero* on-dock rail traffic at NIT. In fact, in the last couple of decades, CSXT was only able to provide *de minimis* service to NIT via rail, and that was during a period of extraordinary circumstances and demand caused by the February 2015 West Coast port labor strike. During that extraordinary period, the cargo surge at NIT created demand for drayage to CSXT's rail terminal that could not be supported by truck drayage capacity. In response to concerns of CSXT's customers and NIT due to the buildup of large numbers of CSXT-destined containers at NIT, CSXT attempted to utilize NPBL to meet shippers' demand for service from NIT despite the \$210/car cost-prohibitive rate. But NSR used its control over the line and NPBL to impede the movement of CSXT's traffic, and CSXT was able to move only a small number of

trains and containers. Since 2015, CSXT has been unable to move any intermodal traffic by rail to or from NIT. NSR has successfully stifled competition by foreclosing CSXT's access to NIT via NPBL's cost-prohibitive switching rate and refusal to consider operational arrangements that would permit CSXT to effectively reach NIT with a reliable operation with sufficient and predictable daily capacity.

The adverse effects of this longstanding anticompetitive conduct could not be more apparent. At port facilities along the East Coast where CSXT and NSR have dual access, the amount of rail traffic tends to be relatively evenly split between CSXT and NSR. CSXT has rights to access NIT through NPBL, yet CSXT has *zero* on-dock rail traffic at NIT. This is the result of NSR's unlawful control of NPBL.

Contrary to NSR's claim, drayage of intermodal containers from NIT to CSXT's rail facility, approximately nine miles across Norfolk, is not an effective competitive alternative to on-dock rail access. This movement, on urban streets not intended for industrial activity, bisects the Old Dominion University campus and multiple residential areas. Movement of rail containers by drayage at NIT is limited to the hours of 5:00 am – 6:00 pm, Monday through Friday, while throughput via rail operates seven days/week, 24 hours per day.

Again, the proof that drayage is not competitive is in the numbers. In the Virginia Port Authority's ("VPA") fiscal year 2024, CSXT moved approximately 26,000 containers via NIT by truck. While CSXT does not possess the actual volume data for non-CSXT traffic at NIT, statistics published by VPA, coupled with our data, indicate that NIT handled more than 300,000 rail containers in fiscal year 2024 and that NIT has capacity to handle as many as 400,000 rail containers each year. Such an imbalance is compelling evidence that drayage traffic does not provide an effective competitive alternative.

Publicly-available materials from VPA, which owns and operates NIT, indicate that NIT capacity is going to expand substantially. VPA recently completed an \$83 million Central Rail Yard expansion at NIT, which will open for business in 2025 and will provide a total rail container capacity at NIT of over 600,000 containers. *See, e.g.*, The Port of Virginia, Norfolk International Terminals (NIT), <https://www.portofvirginia.com/wp-content/uploads/2024/03/2024-NIT-1-Pager.pdf>. Additionally, VPA has announced plans to renovate, expand and modernize the North Terminal at NIT. The project is expected to be completed in 2027. *See id.* Clearly, it would not be in the public interest to restrict CSXT from being able to serve that additional capacity. Thus, effective dual rail access to NIT is going to become even more critical.

NSR has managed to exclude CSXT for many years from access to NIT through its unlawful control of NPBL. NSR has repeatedly used its control of NPBL to prevent NPBL from considering rate and service proposals that would permit CSXT to compete for on-dock rail access at NIT. In 2009, and again in 2018, CSXT presented NPBL with concrete commercial proposals that would have given CSXT a chance to compete for rail traffic at NIT while allowing NPBL to make additional profits. However, NSR used its unlawful control of NPBL to keep CSXT's proposals from ever being adopted.

Yet again, in 2024, after the STB had ruled that NSR was not authorized to control NPBL, CSXT made new commercial proposals to NPBL that would have given CSXT an ability to compete for NIT traffic while providing NPBL with the ability to gain new traffic. NSR again used its control over NPBL – control that the STB has declared to be unlawful – to prevent NPBL from considering the proposal. The correspondence related to CSXT's proposal is attached as Attachment A.

Under the proposal that CSXT presented NPBL in 2024, CSXT would be providing all equipment and fuel and paying for NPBL labor. However, NPBL still refused to accept the proposal. This was not the action of a rational, independent railroad, and certainly not the action of a terminal railroad which was established “for the mutual benefit of each” owner and in which “all [owners] are to be equally interested.” (Ex. 1 to CSXT’s Petition to Reject, Complaint, Ex. A 3 of 9.) It was the action of an entity that is being unlawfully manipulated by NSR.

2. The NSR application presents information on supposedly comparable rates of other terminal railroads, which is misleading and inaccurate.

As I noted above, my purpose in presenting this statement is not to address the underlying merits of NSR’s application for control authority but to urge the Board not to treat the transaction as a minor application because of the serious competitive issues it raises. But I note that the application is full of inaccuracies, and I identify one of those below.

In the verified statement of Daniel L. Fapp, submitted with the NSR application, Mr. Fapp asserts that he “performed an analysis of other switching operations and rates based on the length of haul between the interchange point and the marine terminal the switch carrier serves on all Gulf Coast and East Coast ports that ship international containers and utilize short line switching services.” (Appl., V.S. Fapp 5-6.) He asserts that, “[w]hen these switching fees are placed on the same per-container-mile basis, the NPBL switch fee is lower than all of the other port terminal fees that [he] analyzed[,]” and provides a table that he claims shows the results of his analysis. (*Id.* at 6. *See also id.* at Ex. 3.)

CSXT intends to conduct a full analysis of Mr. Fapp’s assertions, if and when the STB decides to accept any NSR control application. In this Verified Statement, I will only note that the information Mr. Fapp presents regarding supposedly comparable rates is inaccurate and misleading. For example, Mr. Fapp included Brownsville & Rio Grande International Railroad

(Port of Brownsville) and Galveston Railroad (Port of Galveston) in his analysis. However, CSXT understands that neither of these railroads move significant volumes of international intermodal containers and thus are not in any respect comparable to NPBL. In a separate verified statement, CSXT's economic expert, Julie M. Carey, further discusses the inaccuracies regarding Mr. Fapp's analysis.

* * *

It is clear that NSR's ongoing unlawful control of NPBL has had, and is continuing to have, adverse effects on competition. Therefore, the Board should determine that the proposed transaction is "significant."

VERIFICATION

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

Executed on February 26, 2025.

/s/ Maryclare Kenney

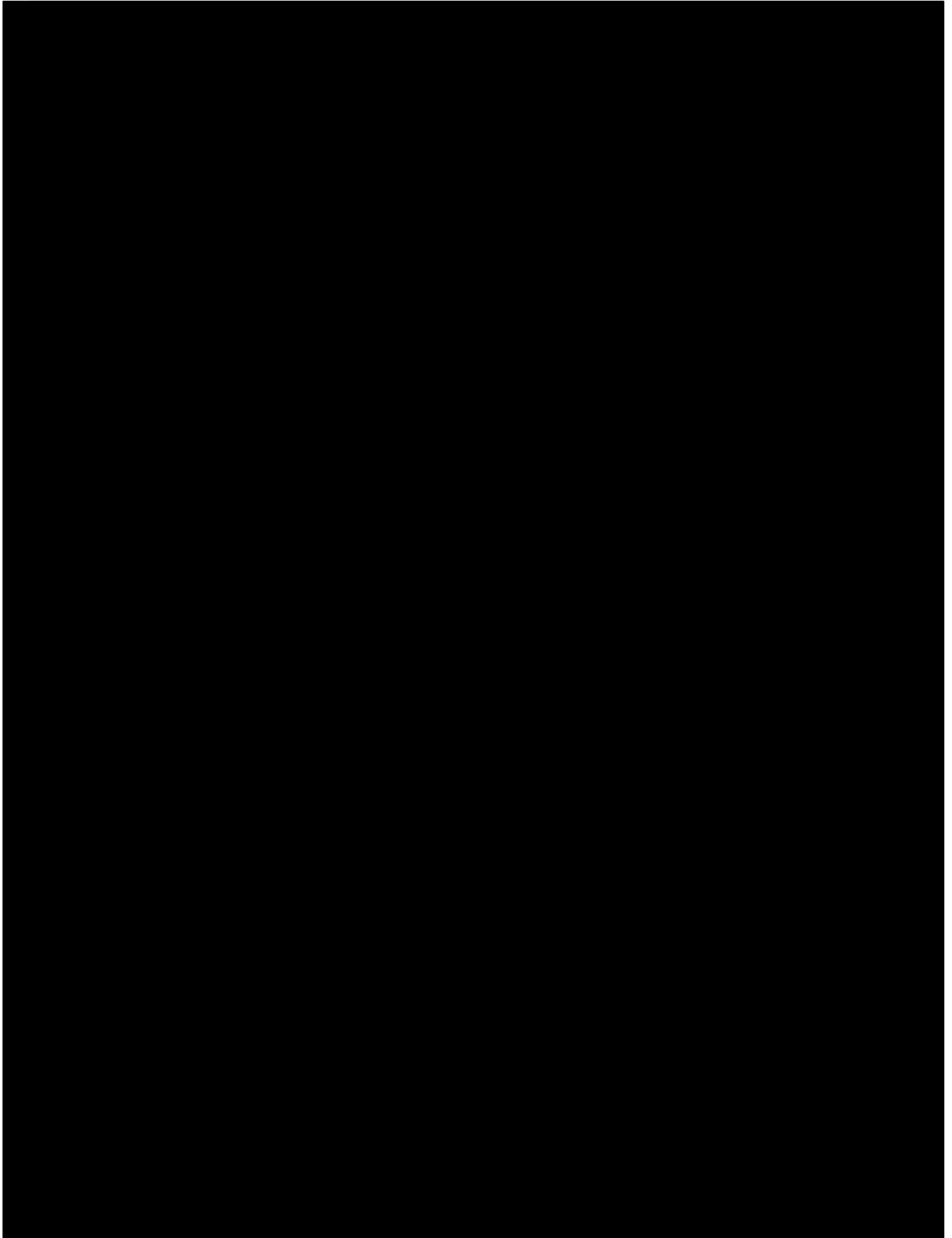
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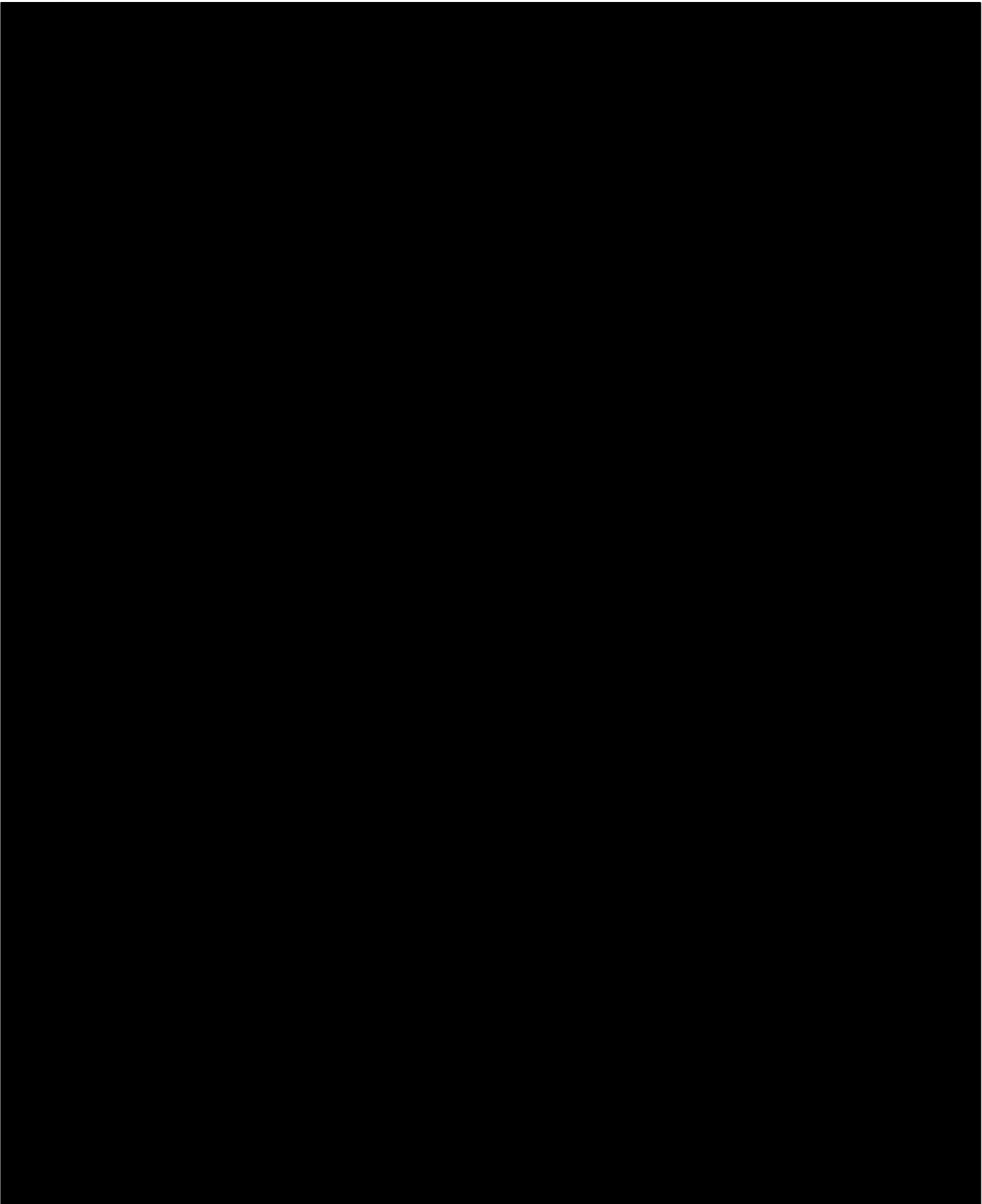
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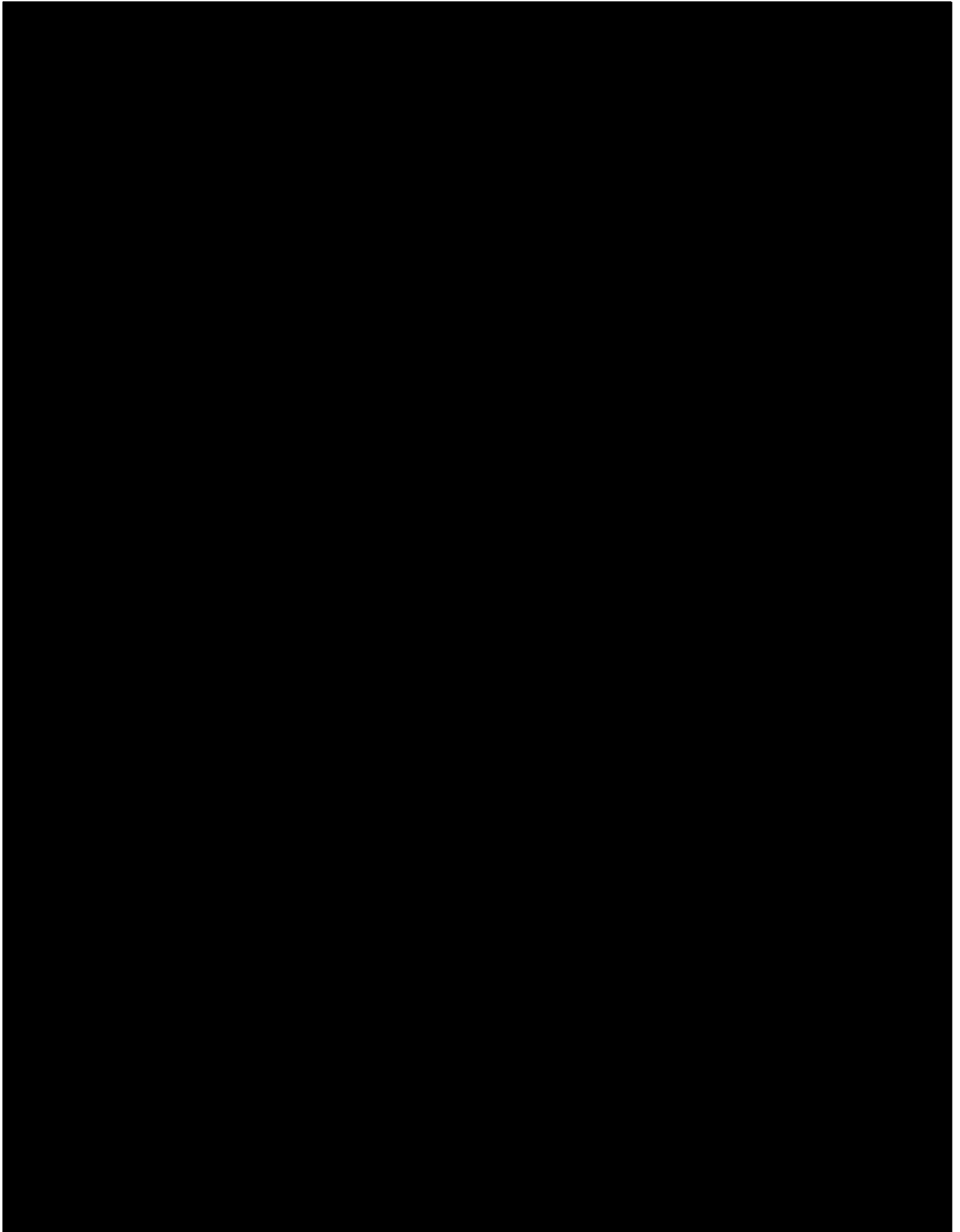
ATTACHMENT A

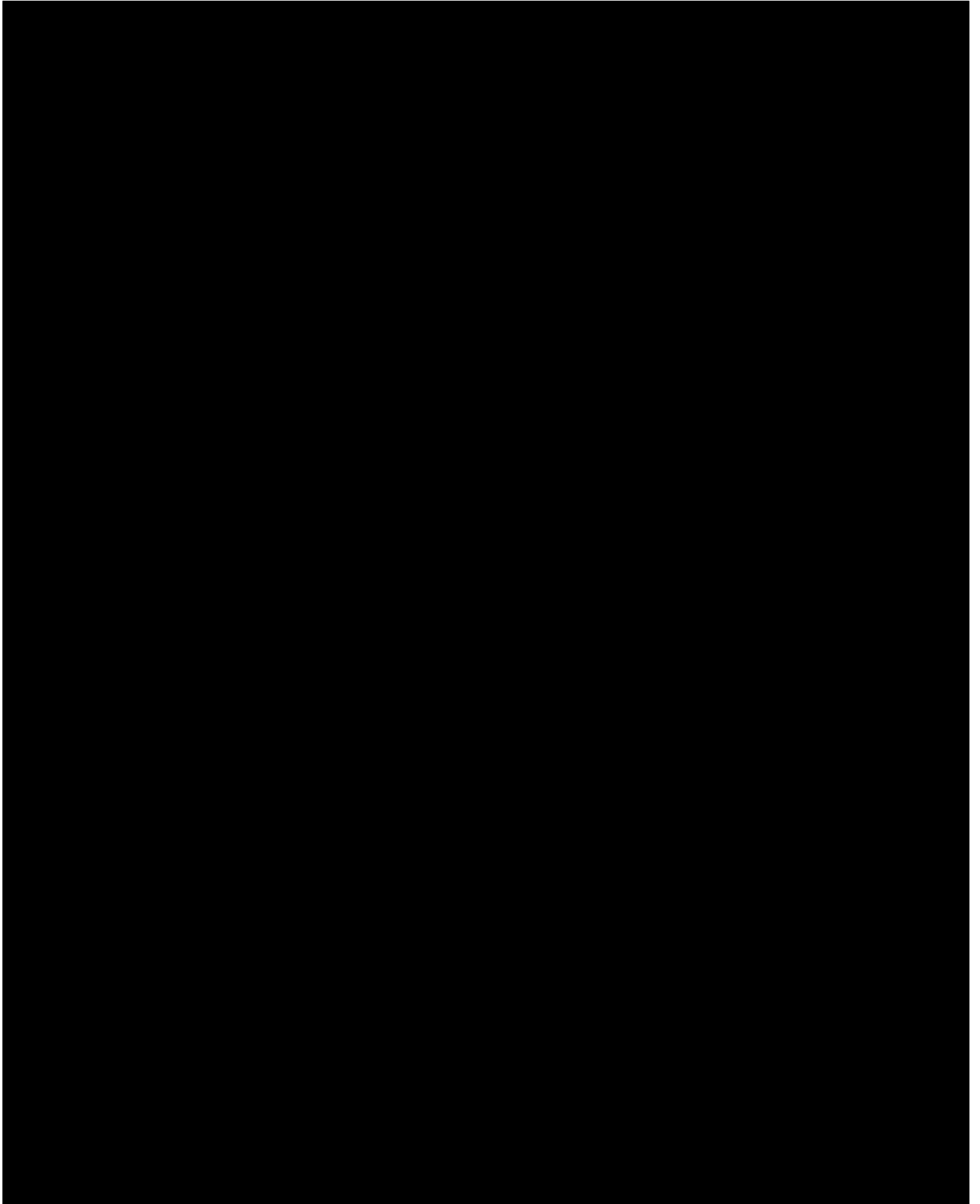
RECENT CORRESPONDENCE REGARDING
CSXT'S PROPOSALS TO NPBL

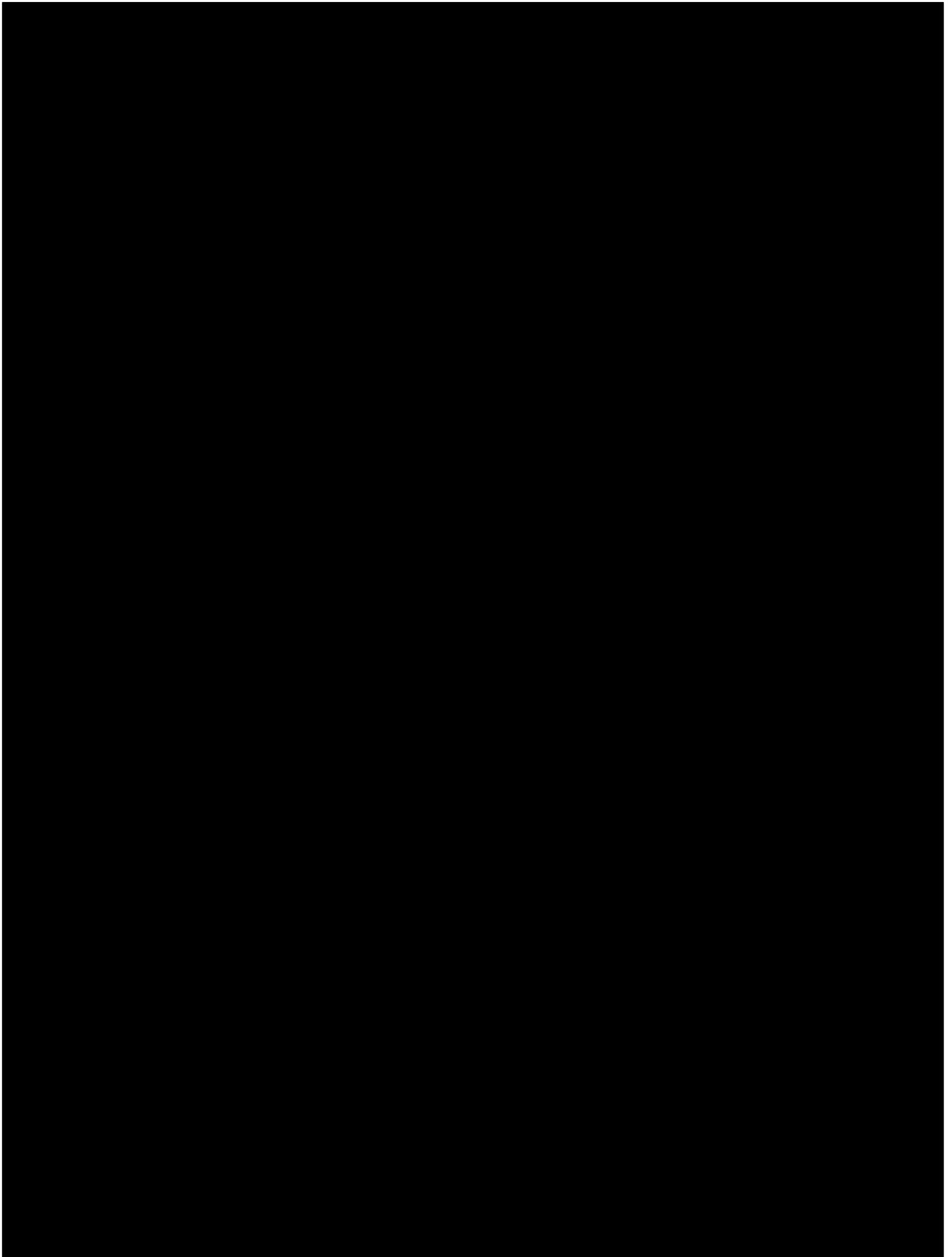
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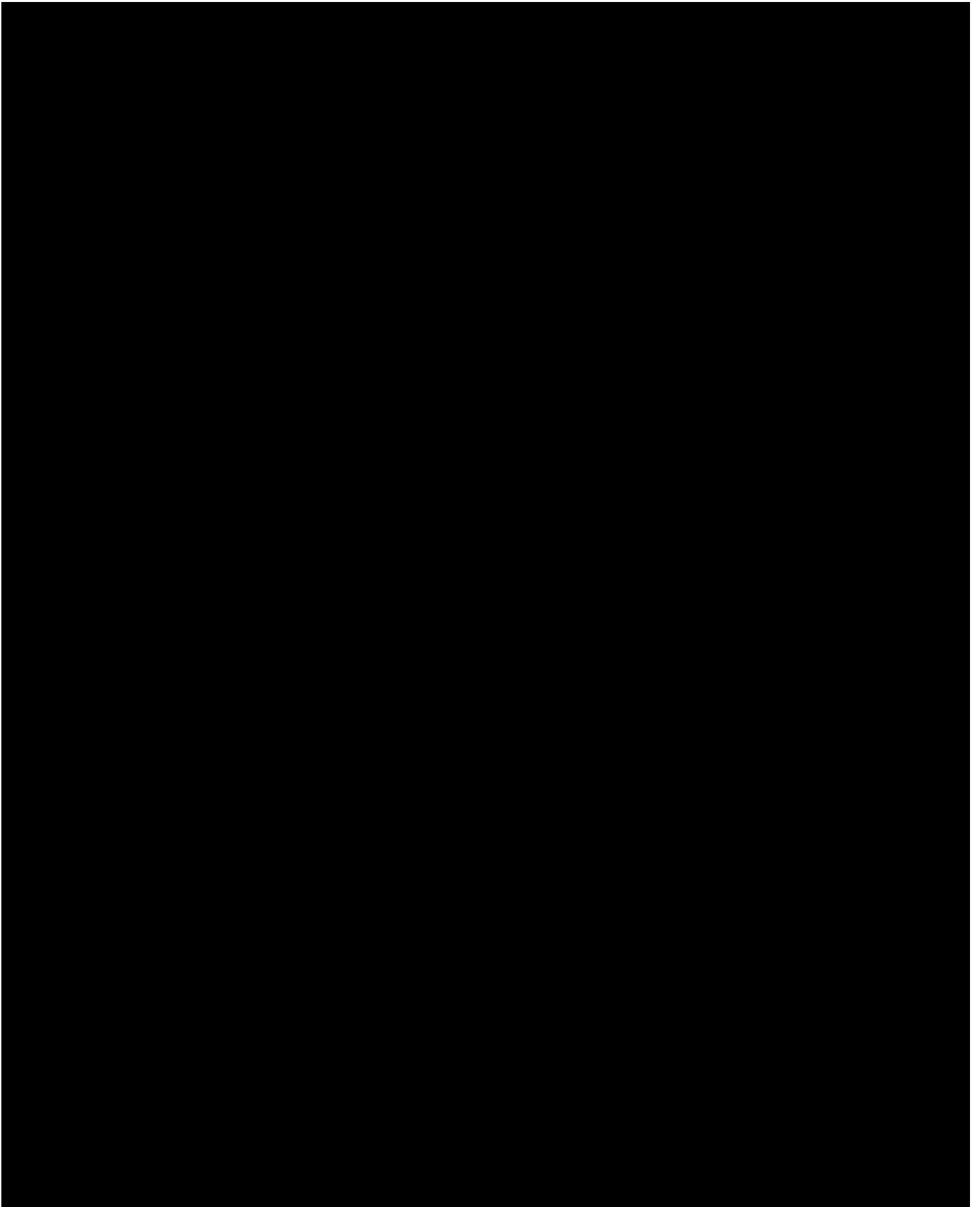


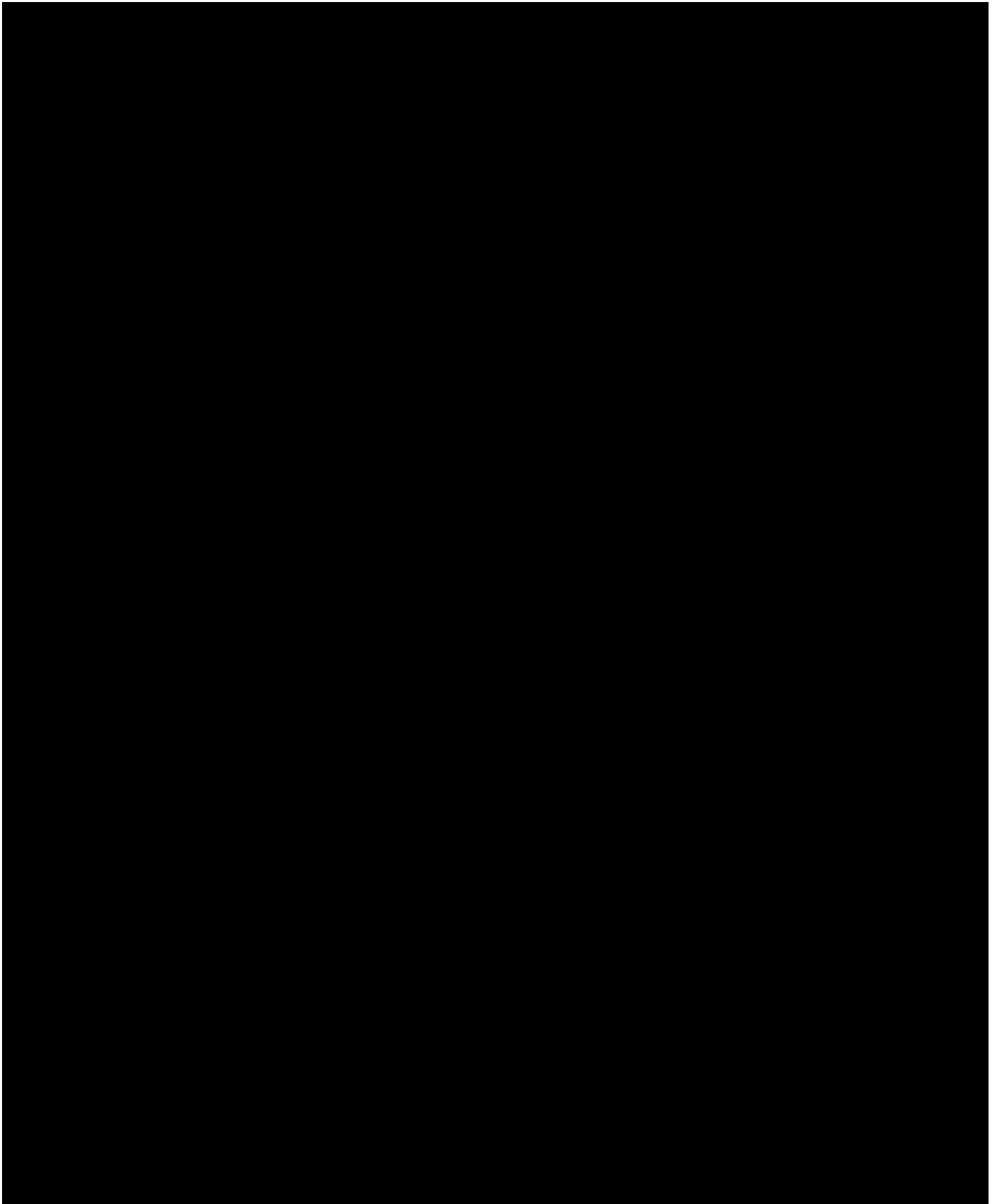












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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

VERIFIED STATEMENT OF JULIE M. CAREY

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I. INTRODUCTION

My name is Julie M. Carey. I am an economist and Senior Managing Director with National Economic Research Associates, Inc. (“NERA”). I frequently provide expert evidence before regulatory agencies, including the Surface Transportation Board (“STB” or the “Board”), as well as in commercial disputes before arbitrators and courts. I have approximately 25 years of experience addressing economic issues in the energy and transportation sectors.

My work routinely focuses on economic analysis at the intersection of competition and regulation across the energy and transportation industries. I have conducted competition analyses many dozens of times in connection with the regulatory approval processes for mergers and acquisitions; claims of discrimination, manipulation, and anticompetitive behavior; and a variety of other purposes such as investigations and commercial disputes. I have substantial experience providing consulting and testifying expert opinions involving competition, negotiated and market-based rates, regulatory economics, economic damages, and other economic analyses within regulatory and commercial disputes. Recently, I have authored several Verified Statements within STB proceedings regarding rail mergers.

I have substantial railroad industry experience. I frequently conduct economic analyses within commercial and regulatory disputes regarding haulage, trackage, leased line and other rail service agreements. I have also worked on many rate reasonableness disputes before the STB, and I have provided economic evidence regarding future expectations of volume, revenue, and rates for a stand-alone railroad.

In addition to my economic consultancy practice, I have been an Adjunct Professor at Georgetown University since 2016. I teach energy economics and policy in the graduate economics and political economics programs, which includes instruction on the economics and regulation of railroad transportation. My Curriculum Vitae is attached as Appendix 1.

II. SUMMARY OF OPINION

In NSR’s application requesting control of NPBL, NSR, in effect, advocates that no economic analysis is required because one can compare the future state of the world where NSR controls NPBL to the current and past state of the world where NSR has “unauthorized” control of NPBL. NSR’s conclusion is that there is no change in competitive circumstances and, therefore no

concern for a lessening of competition.¹ This is the wrong question to ask and is economically meaningless in the current situation.

The current situation is more complicated than NSR presents due to the absence of prior STB authorization for control, and the documented history of concerning anticompetitive conduct by NSR during its unauthorized control of NPBL (discussed below). With this unusual fact pattern, there is a heightened need for an appropriate competitive effects analysis. Such an analysis would compare a pre-transaction state of the world that is free from NSR's control of NPBL to a post transaction state of the world with NSR's control. A state of the world absent NSR's control of NPBL would undo the economic position that NSR sits in today and would simulate the removal of any anticompetitive acts. This state of the world would likely result in higher volumes, lower unit costs, and lower rates commensurate with increased competition.

NSR has not come anywhere near providing the STB with the economic evidence that would be required to make that determination. NSR simply provides no evidence for the STB to conclude that the world would not have been any different absent NSR's control of NPBL.

A forward-looking analysis of competitive effects also raises concerns. Given the concerning past conduct during the unauthorized control period, a free pass would lead to a future period with continued anticompetitive behavior and reduced competition. There is also no evidence in the NSR Application that would allow the Board to assess the future state of competition if the Board denied the acquisition of control, but such an analysis would be necessary to determine the competitive effects of the Board's decision whether to approve or deny.

In addition to these serious conceptual issues, the NSR Application is deficient and lacks credible or usable data for the STB to evaluate competitive factors regarding the market and its competitors. The Application lacks data on the affected shippers necessary to identify the relevant markets, traffic movements including which products have historically traversed the line, origin/destination routes/lanes, relevant pricing data, competition analysis showing competitive alternatives, route options, or market shares for affected shippers. There are a number of vague and anecdotal statements in the Application and supporting verified statements. However, there is no data to evaluate the credibility of the statements.

¹ "This Transaction clearly will not have any anticompetitive effects...NS have had effective control over NPBL for more than 42 years... Board approval of this Transaction will not result in any anticompetitive effects...Granting NS official "control" authority will not change the manner in which NPBL operates today." NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836, February 14, 2025, at pp. 7-8.

And on the issues that NSR chose to address, principally the claimed support for the reasonableness of the NPBL switching rate, NSR's evidence is both incomplete conceptually and empirically flawed. Mr. Fapp claims that NPBL's switch rate is reasonable based on NPBL's costs, but he does not present evidence of NPBL's actual variable costs. In addition, his cost analysis fails to consider what NPBL's costs would be absent NSR's unauthorized control. Mr. Fapp's presentation of other port rates claimed to be market comparables includes unreliable and unsupported inputs and is no substitute for the necessary competitive effects analysis. Lastly, NSR's claims that a uniform rate is non-discriminatory are unsupported and inseparable from the concerns regarding anticompetitive behavior.

The STB should conclude that NSR's application is inadequate and unsupported.

A. No Analysis of Market Dynamics of Affected Shippers and Combined Railroads

Mr. Fapp and the NSR Application do not provide economic analysis of the relevant markets impacted by the Proposed Transaction.²

As a starting point, I looked for information on the shippers that use the NPBL in order to understand the customers affected by the Transaction. However, there was no such information presented, despite NSR's claim that "[t]he Transaction will not adversely impact any shippers."³

Specifically, I sought to understand how the affected shippers use the NPBL, NSR, and CSXT railroad networks. However, no data or analysis was provided to observe actual historical traffic movements. No information was provided regarding the origins, destinations, or routes/lanes currently used by NPBL shippers. No information was provided regarding the types of commodities (often defined by STCC code) used by NPBL shippers over the various routes/lanes. Understanding what products historically traversed the line, where in the world the products came from, as well as the ultimate destination is necessary to understand the business as well as to evaluate the potential competitive effects of the Transaction. Similar information for NSR would also be needed to better understand the market and the combination of the two railroads.

² Notably, there is no economic analysis completed in NSR's "Effect on Competition" section, NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836 Feb. 14. 2025 at pp. 23-27. *See also* V.S. of Daniel Fapp, pp. 1-16.

³ NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836, February 14. 2025 at p. 38 (hereafter "NSR Application").

This market-related information is the type of information one would expect to support the claims made by Mr. Fapp regarding competitive alternatives.⁴ In addition, it is common for applicants requesting a minor transaction to include information regarding the shippers, routes/lanes, and products involved in the transaction.⁵

B. Generic and Incomplete Information on Competitive Alternatives

Mr. Fapp and Mr. McClellan identify transportation options theoretically available to shippers in the area.⁶ However, there is no evidence that any affected shippers⁷ on the NPBL line can and do use the alternative competitors identified by Mr. Fapp or Mr. McClellan (other ports, NPBL/CSXT, drayage to CSXT, NSR on-dock), for any product types and route options/lanes. Nor was there any presentation of the differences in the competitive alternatives that would exist with and without NSR control of NPBL.

Mr. Fapp reports general statistics of trucking and rail in the area that are insufficient to evaluate the competitive effects to NPBL customers and whether the potential alternatives are price and service competitive.⁸ Analysis of actual traffic volumes and routes/lanes used by NPBL customers for specific products, along with similar information for NSR, could help the Board understand the relevant markets and potential competitive impacts.

Further, both Mr. Fapp and Mr. McClellan claim that CSXT offers a competitive alternative.⁹ However, neither report that CSXT currently has zero on-dock railroad intermodal traffic volumes at

⁴ NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836, Feb. 14. 2025, V.S. of Daniel Fapp (hereafter “Fapp,” at pp. 10-15.

⁵ “Applicants submitted a detailed geographic market study of origin and destination markets showing that the acquisition would not increase market concentration.” See, Docket No. FD 35087, Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, Decision No. 2 November 26, 2007, at p. 5. “An extensive review of the route structures and traffic flows of CN and the freight rail systems owned and operated by GLT yields only a single shipper overlap - Koppers at Ambridge, MN - and one additional instance of significant shipment overlap -- the shipment of taconite pellets into Indiana Harbor, IN....” Docket No.34424, Canadian National Railway Company and Grand Trunk Corporation - Control – Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company, November 5, 2003, V.S. of Chirstopher Vellturo, p. 5, 13-14.

⁶ See Fapp at pp. 10-15. Mr. McClellan states “[e]ach of the international container transfer port facilities along the East Coast are in direct competition with each other.” NSR Minor Application for Acquisition of NPBL, Docket No. FD 36836, Feb. 14. 2025, V.S. of Michael McClellan (hereafter “McClellan”) at p. 6.

⁷ Or potentially affected shipper on the NPBL line.

⁸ For example, Mr. Fapp states that “59% of Virginia Port Authority cargo moved by truck, compared to 36% moving by rail and 5% moving by barge. This points to the economic and operational advantage that makes drayage a competitive option with rail for CSXT containers at NIT.” See Fapp Statement at p. 8. However, the statistic provides no information as to whether trucks are used to deliver containers to/from customers or if they are used for drayage.

⁹ See Fapp at p. 10. See also McClellan at p. 28.

NIT¹⁰ while NSR has virtually all the economically attractive on-dock railroad intermodal traffic at NIT. Furthermore, Mr. Fapp did not sufficiently evaluate the economic viability of either the unavailable NPBL/CSXT on-dock railroad alternative with the current NPBL tariff rate to NIT or the limited trucking drayage alternative that CSXT is forced to use for access to NIT.

Mr. Fapp's evidence regarding inter-port competition is also incomplete.¹¹ For example, there is no analysis that other ports on the eastern seaboard are capable of serving the affected customers with reasonably competitive route options/lanes and a competitive price and quality of service standard necessary for the highly competitive intermodal business.

Additionally, Mr. Fapp implies that terminals within the Virginia Port Authority are equivalent, suggesting that VIG is a substitute for NIT,¹² disregarding that NIT is advantaged with a larger capacity port with excess capacity and plans for even further expanded capacity in the future.

Taken together, Mr. Fapp's evidence is incomplete and unreliable regarding the economics of competitive alternatives, or even the relevant routes currently in use.

C. No Competitive Effects Analysis Despite a History of Concerning Conduct

Mr. Fapp provides no analysis of the competitive effects of the Proposed Transaction. Mr. McClellan suggests that continued rail investment at the Port of Virginia by NSR and CSXT is evidence of competition but fails to provide any supporting economic analysis.¹³ As discussed above, NSR Application lacks information regarding the origin and destination routes/lanes used by NPBL and NSR, as well as any alternative routes/lanes that could be used. In addition, no traffic volumes, commodities or market shares were provided for any specific routes/lanes for affected customers, either with or without NSR control of NPBL. Indeed, no foreclosure or quantitative evidence sufficient to conclude the absence of anticompetitive effects such as whether the NPBL rate forecloses CSXT from competing with NSR was presented.

¹⁰ See Verified Statement of Maryclare Kenney, at p. 2

¹¹ See Fapp at p. 11-13.

¹² See Fapp at p. 16.

¹³ See Fapp at pp. 10-15. See also McClellan at pp. 9-18. More specifically, Mr. McClellan makes the flawed claim that CSXT's traffic volumes on NPBL demonstrate a competitive market. He presents no analysis of the CSXT use of NPBL today (product, origin/destination etc.). I understand CSXT's current traffic movements on NPBL are unrelated to intermodal terminal access at NIT.

Crucially, Mr. Fapp (and NSR) disregard the fact that NSR never received authorization from the STB for its control of NPBL.¹⁴ Inexplicably, and without any economic support for the underlying basis, NSR asserts that Board need “look no further than the 42-year history of NSC’s effective control of NPBL to conclude there will not be any such lessening of competition.”¹⁵ There is no economic basis to support this statement.

Pre-existing concerns for anticompetitive conduct from NSR’s control over the NPBL¹⁶ were documented in an antitrust litigation. For example, concerns were raised for NPBL and NSR’s conduct with regard to its switch rate, other service quality and access challenges during the 2015 period.¹⁷ Additional concern was identified from NSR’s actions in 2018 to vote against restructuring the NPBL board to give CSXT equal representation, which vote was made possible by NPBL’s corporate governance structure and majority ownership.¹⁸ Additional types of concerns were identified regarding the 2008-2018 period.¹⁹ The pattern of historical behavior raises serious questions and concerns for the economic case of NSR’s Application.

Other minor applications, which did not have a preexisting concern for anticompetitive behavior as in this instance, included more detailed information with a description and details regarding the geographic routes/lanes and traffic movements for shipments involved in the transaction.²⁰ Certain Applications indicated that there is no vertical foreclosure as a result of the

¹⁴ “...[t]he Board finds that the Board’s predecessor, the ICC, did not authorize NSC to control NPBL.” See Docket No. FD 36522, Norfolk Southern Railway Company – Petition for Declaratory Order, June 17, 2022 at p. 1.

¹⁵ NSR Application at p. 14.

¹⁶ NSR’s 57% ownership. NSR Application at p. 12.

¹⁷ *Decision No. 23-1537, CSXT v. NSR & NPBL*, U.S. Court of Appeals for the Fourth Circuit, March 21, 2024, at pp. 6-7 and 20 - 21.

¹⁸ In 2018, NPBL declined to move forward and implement a CSXT proposal to pay NPBL “a switch rate of \$80 in exchange for a promise to move a minimum annual volume of train cars,” *Decision No. 23-1537, CSXT v. NSR & NPBL*, U.S. Court of Appeals for the Fourth Circuit, March 21, 2024, at pp. 7-8. CSXT’s proposal included free use of CSXT locomotives and free fuel for use by NPBL.

¹⁹ In summarizing its complaint which includes acts from 2008-2018, CSXT expressed concern that “...NS has failed to co-operate with CSX to encourage the business of NPBL, blocked CSX from using NPBL failed to act on proposals that would encourage the business of NPBL, insisted on actions that would harm NPBL, and induced its directors to do the same.” – Plaintiff CSX Transportation, Inc.’s Consolidated Opposition to Defendants’ Motions for Summary Judgment at pp. 69-70. Additional concerns were raised about NS’s imposed logistical and operational obstacles to access NIT. *Ibid* at pp 20-21. CSXT also claims that NSR blocked efficient on-dock rail service to and from NIT forcing less efficient trucking movements to and from the Portsmouth terminal. *Ibid* at pp 33-35.

²⁰ “In addition, applicants submitted a detailed geographic market study of origin and destination markets showing that the acquisition would not increase market concentration.” Docket No. FD 35087, Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, Decision No. 2 November 26, 2007, p. 5. “Its competitive analysis shows there are four potential 2-to-1 corridors...” Docket No. FD 35873, Norfolk Southern Railway Company — Acquisition and Operation — Central Rail Lines of the Delaware and Hudson Railway Company, Inc., Decision No. 1, December 16, 2014, at p. 4.

transaction.²¹ In other cases, the Board cautioned against not providing sufficient competition statistics and has guided parties to do so, as well as required parties to provide more detailed economic analysis in separate cases.^{22, 23}

In this case, with no prior authorization for control, as well as past concern for anticompetitive conduct by NSR during its unauthorized control of NPBL, there is a heightened need for an appropriate competitive effects analysis. Such an analysis would compare a pre-transaction state of the world that is free from NSR's control of NPBL to a post transaction state of the world with NSR's control. A state of the world absent NSR's control of NPBL would undo the economic position that NSR sits in today and would simulate the removal of any anticompetitive acts that would likely result in higher volumes, lower unit costs and lower rates commensurate with increased competition.

D. The NSR Application Lacks Any Identified Public Benefits or Proposed Remedies

It is understood that, given the presence of potential competitive concerns, those concerns must "clearly be outweighed by the transaction's anticipated contribution to the public interest..." to be considered a minor transaction.²⁴ However, the NSR application makes no attempt to identify potential benefits. In lieu of identifying specific benefits, there are unsupported statements that the

²¹ Docket No. FD 35087, Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, Decision No. 2 November 26, 2007, p. 5, Docket No. FD 35081, Canadian Pacific Railway Company, et al – Control – Dakota, Minnesota & Eastern Railroad Corp, et al, Decision No. 2, November 2, 2007, p. 5. Docket No. FD 34424, Canadian National Railway Company and Grand Trunk Corporation—Control—Duluth, Missabe and Iron Range Railway Company, Bessemer and Lake Erie Railroad Company, and the Pittsburgh & Conneaut Dock Company, Decision No. 2, December 1, 2003 at p. 8.

²² "[A]lthough Applicants' submission states that no currently served shipper would become captive as a result of the transaction (i.e., no shipper would have its competitive options reduced from two carriers pre-transaction to one carrier post-transaction), it does not clearly establish that there would be no other anticompetitive effects that might result...For example, it does not contain information that rules out the possibility that there are some shippers whose competitive options would be reduced post-transaction." See, Docket No. FD 35081, Canadian Pacific Railway Company, et al – Control – Dakota, Minnesota & Eastern Railroad Corp, et al, Decision No. 2 November 2, 2007, at pp. 6-7.

²³ Even when submitting a "significant transaction", the board has ruled an application insufficient. "However, the Board finds that the Market Analysis and supporting verified statements do not sufficiently describe "the impacts of the proposed transaction—both adverse and beneficial—on inter-and intramodal competition," nor do they meet the other specific requirements for a Market Analysis, including the requirement for supporting data" CSX Corporation and CSX Transportation, inc. et al, Corporation – Control and Merger – Pan Am Systems, Inc, Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont and Massachusetts Railroad Company – Decision No. 3, May 26, 2021, at p. 7.

²⁴ NSR Application at p. 7.

“transaction will further competitive market conditions.”²⁵ Given the lack of evidence of public benefits to the extent that any competitive concern exists, nothing exists to outweigh that concern.²⁶

The NSR Application also did not identify any proposed remedies. Applicants in a minor transaction will often include proposed remedies that ameliorate any potential anticompetitive concerns.²⁷ NSR’s commitment to maintaining a “uniform cost-based switching rate”²⁸ is an unsupported and insufficient commitment, as discussed below. Lastly, NSR suggests that it will keep NPBL’s rates reasonable based on costs and will develop an appropriate trackage rights fee.²⁹ However, these are unsupported, and the STB should carefully consider past concerns in these areas.

III. ADDITIONAL INCOMPLETE EVIDENCE TO SUPPORT THE CLAIMED REASONABLENESS OF THE NPBL RATE AND THEREFORE THE TRANSACTION.

A. The Claims that Operating Expenses Demonstrate Reasonableness of Rates is Conceptually Flawed and Unsupported

NSR’s legal brief points to the reasonableness of a so-called cost-based rate as evidence that the NPBL switch rate is reasonable, and therefore “NPBL’s ability to substantially profit from its operations is restricted.”³⁰ NSR relies on Mr. Fapp’s analysis of NPBL’s costs. I reviewed the NPBL operating expense analysis that Mr. Fapp uses to conclude that the NPBL switch rate is reasonable.³¹ I find that the analysis is conceptually flawed, and the data and analysis is otherwise unreliable and incomplete.

First, there is a fundamental conceptual issue with Mr. Fapp’s cost analysis because the cost structure inherently reflects NSR’s unauthorized control. To the extent that the total operating costs per railcar reflect reduced volumes and decreased density on the line that is due to anticompetitive behavior, rather than market-related factors, the cost structure is not economically meaningful and

²⁵ NSR Application at p. 65.

²⁶ See Docket No. FD 36744, Canadian National Railway Company and Grand Trunk Corporation – Control – Iowa Northern Company, Decision No. 1, February 29, 2024, at page 6.

²⁷ See Docket No. FD 36744, Canadian National Railway Company and Grand Trunk Corporation – Control – Iowa Northern Company, Decision No. 1, February 29, 2024, at p. 6. See also Docket No. FD 36472, CSX Corporation and CSX Transportation, Inc. et al, Corporation – Control and Merger – Pan Am Systems, Inc, Pan Am Railways, Inc., Boston and Maine Corporation, Maine Central Railroad Company, Northern Railroad, Pan Am Southern LLC, Portland Terminal Company, Springfield Terminal Railway Company, Stony Brook Railroad Company, and Vermont and Massachusetts Railroad Company, Decision No. 1, March 25, 2025, at pp. 8-9.

²⁸ NSR Application at p. 27.

²⁹ NSR Application at p. 27.

³⁰ NSR Application at p. 13.

³¹ See Fapp at p. 4.

cannot be used to conclude it is an appropriate cost level and therefore a reasonable rate. Indeed, any increased volumes and density on the NPBL line from the removal of anticompetitive behavior would reduce the total operating cost per unit and therefore result in a lower “cost-based”³² switch rate.³³ For these reasons, Mr. Fapp’s and NSR’s conclusions are unsupported.

Second, the underlying cost data relied upon by Mr. Fapp is unreliable and incomplete because the estimated NPBL operating expenses do not use specific variable operating expenses.³⁴ Instead, Mr. Fapp uses an unsupported assumption that NPBL’s variable operating expense percentage of the total operating costs should match an URCS table estimate for the eastern U.S. railroads.³⁵ This data is wholly unrelated to the NPBL line and its services.³⁶ Furthermore, NPBL’s specific variable operating expenses would be necessary to estimate the variable cost of NPBL and the different services offered.

B. The Claims that Uniform Rate are Non-Discriminatory is Unsupported and Inseparable from the Concerns for Anticompetitive Behavior

NSR claims that NSR and CSXT will be treated in a non-discriminatory manner on NPBL because the rates are uniform.³⁷ NSR states “... to the extent that CSXT seeks a lower rate for its traffic than that charged to all other users and NSR, it is CSXT who seeks to impose a discriminatory rate in favor of its operations at NPBL and NSR’s expense.”³⁸

The NSR Applications provides no economic analysis to support that a uniform rate is non-discriminatory. Charging a single rate for different services with different economic characteristics could be discriminatory and anti-competitive. The NSR Application does not explain how CSXT could discriminate against NSR given that it does not use the NPBL line for intermodal traffic.

³² NSR Application at p. 21.

³³ There could be additional concerns with the costs arising from NSR’s unauthorized control, but limited data was presented by Mr. Fapp.

³⁴ Limited detailed information on the total costs was provided to determine if it is reliable or appropriate with regard to the specific circumstance here, in consideration for NSR and NPBL.

³⁵ “The STB’s URCS Table D8 Part 4 shows the calculation of the operating expense and depreciation variability percentages. I developed a composite operating and depreciation expense variability percentage based on the data contained in each year’s STB Eastern Region URCS formula” See Fapp at p. 3, FN 6.

³⁶ “The Board publishes URCS for eastern- and western-United States regional costs based on a compilation of U.S. Class I data.” See STB, Uniform Rail Costing System (URCS), at <https://www.stb.gov/reports-data/uniform-rail-costing-system/>. See also WP_Fapp_001203-Fapp_001203 at tab “East Region Variability” at FN 1-4.

³⁷ NSR Application at p. 26-27.

³⁸ NSR Application at p. 27 FN. 46.

Thus, claims regarding the reasonableness of NPBL's rate or the claim that the rate is truly cost-based are incomplete and insufficient.

C. The Claimed Market Comparables are Inappropriate and Inadequate

Mr. Fapp also provides a summary of switch rates at other ports that he suggests are market comparables and attempts to use this data to conclude that the current NPBL switch rate is priced competitively.³⁹ However, this analysis is incomplete and unreliable for numerous reasons despite his assertion that the NPLB rate is "more than reasonable."⁴⁰

First, the survey of switch prices is no substitute for the necessary competitive effects analysis described in section II.

Second, the switching rates provided are not economically meaningful without analysis of the specific circumstances in each market including economic and operational characteristics, such as throughput levels or use of rail contracts instead of tariffs. As such, other ports may not be comparable to NIT in economic or operational aspects. Relatedly, as the majority of costs are associated with the switching function, a per mile rate is not economically meaningful. Mr. Fapp has not considered these factors.

Third, the underlying data are inadequate, wrong, or inconsistent.

Regarding the first four port railroads listed on Mr. Fapp's Table 2 (Terminal Railway-Port of Mobile, AL, Wilmington NC Terminal, Savannah Port Terminal Railroad, and Jacksonville Port Terminal Railroad), I understand from discussions with CSXT personnel that none of CSXT's intermodal traffic volumes at these ports use the reported tariff rate. This implies that the tariff rate is not economically meaningful.

For the fifth port listed on Mr. Fapp's Table 2, Alabama State Port Authority, a lift charge is reported instead of a linehaul switching charge, which is the relevant charge in the NPBL Tariff.⁴¹

For the sixth port listed on Mr. Fapp's Table 2, New Orleans Public Belt Railroad, the railroad is owned by the port and the switching services, at least in part, have been provided under private

³⁹ See Fapp at p. 6.

⁴⁰ See Fapp at p. 16.

⁴¹ See Fapp_000890_Fapp_000966 at Fapp_000965 and Fapp_000966

contract.⁴² For the seventh port listed on Mr. Fapp's Table 2, the Birmingham Rail Terminal is an inland container terminal, which, therefore does not handle deepwater container vessels.⁴³

For the 8th and 9th ports listed on Mr. Fapp's Table 2, I understand from discussions with CSXT, that the ports for the Galveston Railroad and the Brownsville & Rio Grande International Railroad have virtually no intermodal container volumes (for rail or truck) and publish no container statistics.

The Port Jersey Rail Division only handles carload traffic (boxcars, hoppers, gondolas, etc.) and not intermodal containers for international movements through the Port of NY and NJ.⁴⁴ Also, CSXT and NSR use Conrail service⁴⁵ (at a cost pass through).

For the last two examples, Palmetto Railroad's, Charleston and North Charleston subdivisions, no non-inland on-dock rail intermodal exists at either terminal.⁴⁶

In sum, the market comparables analysis is deeply flawed and unusable.

⁴² Business News of New Orleans, CN Railway signs supply chain agreement with Port of New Orleans, September 2, 2015, available at <https://bizneworleans.com/cn-railway-signs-supply-chain-agreement-with-port-of-new-orleans/>

⁴³ Birmingham-Jefferson County Port Authority, available at <https://birmingport.org/>

⁴⁴ See New York New Jersey Rail, LLC, available at <https://nynjr.com/>

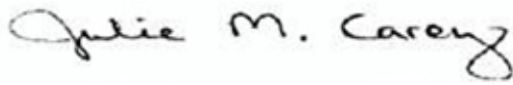
⁴⁵ Port of New York & New Jersey, Intermodal Rail, available at <https://www.panynj.gov/port/en/shipping/rail.html#intermodalRail>

⁴⁶ See terminal locations at Palmetto Railways, available at <https://palmettorailways.com/economic-development>

VERIFICATION

I, Julie M. Carey, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to an authorized to submit this Verified Statement.

Executed on February 26, 2025

A handwritten signature in cursive script that reads "Julie M. Carey". The signature is written in dark ink and is positioned above a horizontal line.

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JULIE M. CAREY
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Julie M. Carey is a Senior Managing Director at NERA Economic Consulting. She has substantial experience with energy and transportation sectors, providing expert evidence in commercial and regulatory disputes, as well as international arbitrations. She has more than 20 years of experience addressing economic issues in energy, pipelines and railroad sectors. Ms. Carey is recognized as a leading energy expert (2019-2025) and a leading arbitration expert (2021-2025) by Who's Who Legal.

In addition to her expert consultancy assignments, Ms. Carey is also an adjunct professor at Georgetown University where she teaches a graduate level course in energy economics and policy, which includes instruction on economics of energy products and transportation and regulatory economics.

Ms. Carey routinely provides expert consulting and testifying services in regulatory matters before the U.S. regulators (FERC, STB, etc.) as well as Canadian federal and state/provincial regulatory agencies. Ms. Carey's work also includes commercial disputes before U.S. courts, and within domestic arbitrations and international arbitration venues.

Ms. Carey has substantial expertise in economic analyses of energy and transportation markets. She routinely conducts economic analyses of energy and transportation markets to understand historical and forecasted market conditions (supply, demand and prices), as well as to evaluate competition, claims of market manipulation, and other anticompetitive acts. She has conducted these analyses many dozens of times for the purposes of the regulatory approval of mergers and acquisitions, market-based rate authority, market rules, negotiated rates, as well as within investigations and commercial disputes. Her work includes evaluation of the reasonableness of rates and whether market participant bidding, trading and other behavior is discriminatory or otherwise manipulative, and whether prices reflect competitive market prices. Ms. Carey's work includes a variety of other regulatory economic analysis including affiliate relationships, cost of service and forward-looking costs, among others.

Within her commercial dispute work, Ms. Carey has been involved in many claims of breach of contract including oil and gas, pipelines, coal, power, renewable, and railroad transportation. She has also been involved in cases concerning partnership disputes, delayed plant operations, diminished value claims, replacement power, antitrust and manipulation claims, clean air act, and bankruptcy, among others. Ms. Carey has substantial experience with economic damages (historical and future lost profit analyses) and conducts asset valuation analyses. She has assessed and quantified economic damages and valuations in dozens of cases which include breach of contract, antitrust, class action, and other types of disputes.

Ms. Carey also has experience with environmental analysis (e.g., greenhouse gases and other types of emissions) and macroeconomic modeling (i.e., jobs, GDP, taxes) in which she studies the impact of energy infrastructure construction and operations on the economy for regulatory and business decision-making.

EDUCATION

- **Pennsylvania State University**
Doctoral Studies Program Coursework/M.A., Economics, 1993
- **Allegheny College**
Bachelor of Science, Economics, 1991

PROFESSIONAL EXPERIENCE

2020-Present	NERA Economic Consulting – Senior Managing Director (and Managing Director)
2017-2019	NERA Economic Consulting - Director
2016-Present	Georgetown University (Washington, DC) - Adjunct Professor
2011-2017	Navigant Consulting, Inc. (Washington, DC) - Director
2004-2010	LECG, Inc. (Washington, DC) - Principal
2000-2004	FTI Consulting, Inc. (Washington, DC) - Director, Manager
1996-2000	LECG, Inc. (Washington, DC) - Economist, Senior Associate, Associate
1994-1996	American Public Power Association (Washington, DC) - Research Analyst

CERTIFICATIONS, MEMBERSHIPS, AND AWARDS

- Leading Energy Expert by Who's Who Legal (2019-2025)
- Leading Arbitration Expert by Who's Who Legal (2021 and 2025)
- International Association for Energy Economists
- U.S. Association for Energy Economists

SELECTED RAILROAD PROJECT EXPERIENCE

- Analysis of horizontal and vertical competitive effects on a railroad acquisition. Economic analysis of traffic level competition and market power evaluation.
- Vertical competitive effect analysis of a railroad merger and a joint venture agreement, including analysis of economic terms of the long-term contract, price effect analysis and analysis of railroad costs and profitable pricing strategy for an STB merger review. Assets included US, Canada, and Mexico.
- Economic analysis and expert testimony in an arbitration regarding a reasonable railroad linehaul rate and coal transportation in Western Canada including long term forecasts and valuation related analyses.
- Expert report before the STB addressing economic and regulatory aspects of the appropriate rate to use for trackage rights fees, including numerous valuation methodologies.
- Expert report and expert testimony in an arbitration regarding multiple breach of contract claims for joint-line transportation service, and financial, economic and regulatory considerations regarding the contracts, negotiations and the financial and economic impact and economic damages.
- Expert consultation analyzing economics of containerized freight transportation, including intermodal rail and competition with alternative transportation modes in a transportation contract dispute and claims of anticompetitive behavior for a commercial arbitration.
- Expert report in STB proceeding regarding the potential introduction of indirect competition analyses within market dominance determinations for coal transportation rates to utility generation facilities.

- Expert consultation analyzing the economics of competition and anticompetitive behavior in railroad transportation services including evaluating the impact of fuel surcharges in a commercial arbitration.
- Expert evidence in numerous STB regulatory proceedings involving rail transportation rate disputes for coal, including evaluation of appropriate regulatory economic approach to assess the reasonableness of a rate, evaluation of transportation agreement pricing and service provisions, long term forecasts of coal deliveries, coal-power plant heat rate and performance, transportation rates (all modes), and revenue attribution methodologies for shared facilities.
- Economic analysis of transportation and coal market and damages in claimed breach of coal sales agreement, including analysis of replacement coal, environmental attributes, and costs.

SELECTED EXPERT AFFIDAVITS AND TESTIMONY

In the Matter of an Arbitration under the Rules of the ADR Institute of Canada, Confidential Parties Transportation agreement dispute; Expert Report of Julie Carey; February 26, 2024.

U.S. District Court for the Eastern District of Michigan, Consumers Energy Company and DTE Electric Company, Plaintiff, v. Toshiba America Energy Systems Corporation and Toshiba Corporation, Expert Report of Julie M. Carey, November 1, 2024, Deposition Testimony January 17, 2025.

Colorado Air Pollution Control Division's Proposed GHG Emissions Reduction Rule for the Midstream Sector by CDPHE Air Pollution Control Division, Hearing Testimony of Julie Carey and Sugandha Tuladhar, December 19, 2024.

Confidential parties; Arbitration Act, RSA 2000, c A-43; Carbon Offset Agreement Dispute Expert Report of Julie Carey and Sugandha Tuladhar; November 30, 2024.

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Surface Transportation Board (STB), Docket No. FD 36744, Canadian National Railway Company And Grand Trunk Corporation Control Iowa Northern Railway Company, Expert Report Julie Carey May 29, 2024.

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In the Matter of an Arbitration under the Rules of the ADR Institute of Canada, Confidential Parties Transportation agreement dispute, Expert Report, October 10, 2023, January 15, 2024, February 6-7, 2024.

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Surface Transportation Board (“STB”), FD 36500, Canadian Pacific Railway Limited; Canadian Pacific Railway, Company; Soo Line Railroad Company; Central Maine & Quebec; Railway Us Inc.; Dakota, Minnesota & Eastern Railroad Corporation; And Delaware & Hudson Railway Company, Inc. – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company, Verified Statement of Julie M. Carey (with A. Bremser), February 28, 2022, July 12, 2022 (Rebuttal) and Hearing Testimony September 30 2022.

Shady Hills Energy Center, LLC, V. Seminole Electric Cooperative, Inc., Shady Hills Energy Center, LLC, Counter-Defendant, EFS Shady Hills Expansion Holdings, LLC, EFS Shady Hills, LLC, General Electric Credit Corporation Of Tennessee, Inc., GE Capital Us Holdings, Inc., Ge Capital Global Holdings, LLC, Case No. 8:20-CV-00081-WFJ-JSS US District Court Middle District of Florida (Tampa Division. Expert Report of Julie M. Carey, April 1, 2022; Deposition Testimony June 21, 2022.

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FERC, Change in Status Filing for Market Based Rate Authority for American Electric Power Company, et al. in the Southwestern Power Pool region, Affidavit of Julie M. Carey (with Al Bremser), March 17, 2022.

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REDACTED - TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

VERIFIED STATEMENT OF DR. WILLIAM HUNEKE

VERIFIED STATEMENT OF WILLIAM F. HUNEKE, Ph.D.

I am Dr. William Huneke. I was employed at the Surface Transportation Board (STB) from 2001-2017 and served as the STB's Chief Economist and Director of the Office of Economics. I hold a PhD in economics from the University of Virginia. A copy of my vita is attached to this statement.

As the STB's Chief Economist, I had extensive opportunities to evaluate data and facts relating to rail competition and the competitive dynamics of rail markets. Among other things, I advised Commissioners and STB staff on the economics of proposals in *Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League* (aka "*Paper Barriers*") (Ex Parte 575) and *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* (Ex Parte 711), (Sub. No. 1) *Reciprocal Switching* (Ex Parte 711). Since leaving the STB, I have advised Class I railroads on STB access fee litigation and merger and acquisition issues. I have advised the Mexican Rail Regulator (Agencia Reguladora del Transporte Ferroviario) on rail regulatory policy.

A substantial portion of my time and experience as the STB's Chief Economist involved evaluating proposed railroad transactions seeking STB approval. Those included the following: *Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company* (Finance Docket No. 35087); *Norfolk Southern Railway Company—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.* (Finance Docket No. 35873); and *Norfolk Southern Railway Company, Pan Am Railways, Inc. et. al.—Joint Control and Operating/Pooling Agreements—Pan Am Southern LLC* (Finance Docket No. 35147).

I have been asked by CSX Transportation, Inc. ("CSXT") for my views, based on my experience with rail transactions at the STB, on the question of whether the transaction proposed in FD 36836, *Norfolk Southern Corporation & Norfolk Southern Railway Company—Acquisition of Control—Norfolk & Portsmouth Belt Line Railroad Company*, filed February 14, 2025, is properly designated as a "minor" transaction. It is most definitely *not* a minor transaction. In fact, given the serious competitive issues

and concerns that have existed for years over the relationship between Norfolk Southern Railway Company (“NSR”) and Norfolk & Portsmouth Belt Line Railroad (“NPBL”), I find it hard to believe that NSR even asked the STB to consider treating the proposed transaction as a minor transaction.

The proper classification of a proposed rail transaction for purposes of STB regulatory review is important to the STB and to interested parties. When a proposed transaction raises significant and potentially serious questions about rail competition, market definition and market dynamics, it is important for the STB to give itself sufficient time and data to evaluate the possible impact of the proposed transaction. In addition, interested parties need a full opportunity to participate in the STB’s review, present their views to the STB, and seek appropriate remedies. For those cases, it is important to classify the transaction as significant under the STB’s rules to ensure that the public interest is served.

Given the competitive issues raised by NS’s proposed acquisition of control over NPBL, it would be totally inconsistent with the STB’s practice and objectives to treat this transaction as a minor transaction. Despite NSR’s bold assertions that this transaction has no competitive impacts, the STB should remember that this case has already generated a large litigation record from proceedings before this agency and the federal courts regarding competitive issues. CSXT brought its concerns about anticompetitive conduct by NSR and NPBL to this agency in 2018. And since then, CSXT has been pursuing antitrust claims in federal court over competitive issues relating to NSR and NPBL. In my time at STB, I could not imagine a similar situation arising, and STB not asking to see extensive evidence concerning competition and market dynamics.

The extensive record of competitive concerns should require the STB to find that this case is “significant” so it can analyze competition involving the Port of Virginia. The federal court addressing CSXT’s antitrust claims already concluded that there was evidence of an anti-competitive conspiracy between NSR and NPBL to exclude CSXT from NIT. In its summary judgment decision, the court stated that “CSX has identified sufficient direct and circumstantial evidence of an agreement between NSR and

NPBL in and around 2009 that was aimed (and may have unlawfully succeeded) at erecting barriers to CSX's ability to provide on-dock rail service at NIT." *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679, 727 (E.D. Va. 2023), *aff'd*, 114 F.4th 280 (4th Cir. 2024). I understand that the Department of Justice has very recently opened an antitrust investigation of NS and NPBL. Since the STB's grant of authority confers a statutory immunity, it is especially important that the STB fully and extensively consider competitive issues raised by a transaction such as this one, which has already generated serious anti-competitive concerns. In fact, if the STB rules that this is a minor transaction, given all of the history of competitive concerns associated with it, it begs the question: Will there ever be another significant transaction case if this precedent is set?

The STB will also need to fully consider the implications of many statements made by the applicants about competition and the STB's assessment of competitive effects. For example, my skepticism of NS's assurances of no competitive impacts is heightened as I read statements such as the following in their application, which is the last sentence in Mr. Fapp's verified statement:

"But even if NS were to raise the switching rate to a market-based rate or eliminate switching to CSXT altogether, this would not result in intermodal customers seeing a reduction in competition or eliminate such customers' ability to access CSXT. These customers will still have the ability to use CSXT's drayage service to CSXT's yard; to off-load at VIG; or to shift to other ports served by CSXT." (Appl., V.S. Fapp 16-17.)

The STB should be alarmed at an assertion that is so patently improper, namely that NS can unilaterally reduce competitive options without having a competitive impact. I find that assertion to be incredible. The STB needs to review and analyze NS's assertions of no competitive impacts, and it should do so by treating the proposed transaction as a "significant" transaction.

VERIFICATION

I, William F. Huneke, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on
February 26, 2025.

/s/ William F. Huneke

William F. Huneke

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Summary:

Dr. Huneke has more than 35 years of experience in economics, railroad regulatory policy, management consulting, business analysis and teaching in the commercial and government sectors. He led the analytical work at the Surface Transportation Board. At UUNET he introduced new information technology that dramatically reduced product deployment cycles. He has directed projects that positioned major financial firms to improve business operations and use new technology for competitive advantage. Dr. Huneke taught graduate business courses at the University of Maryland, Robert H. Smith School of Business.

Positions Held

Consulting Economist, 2017-present

Dr. Huneke provides economic advice to private sector clients. His expertise includes management economics, regulatory economics, antitrust, statistics and econometrics. As part of an Organization of Economic Cooperation and Development, Dr. Huneke has advised the Mexican Rail Regulator (Agencia Reguladora del Transporte Ferroviario) on rail regulatory policy and access charge regimes. He has provided testimony and litigation advice to Class I Railroads and the American Short Line and Regional Railroads Association. Rail clients used Dr. Huneke's expertise in the Canadian Pacific-Kansas City Southern merger and CSX's acquisition of Pan Am Railways. He has advised in a private arbitration.

National Academy of Sciences, Transportation Research Board, Committee Rail Freight Transportation, 2017-2020

Dr. Huneke advised the Committee on economic and regulatory matters. He reviewed papers for presentation at the TRB's annual meeting.

Chief Economist and Director, Office of Economics, Surface Transportation Board, 2001-2017

Dr. Huneke led the economic and management analysis on rate regulation cases, railroad practice cases, agency rulemakings, railroad construction cases and railroad mergers. His group was responsible for industry financial reporting, auditing, regulatory costing and the industry traffic sample database.

Adjunct Professor, College of Business and Management, University of Maryland, College Park, MD 1990-2010

For 20 years, Dr. Huneke taught graduate courses in international business, global economic environment, and managerial economics. He also developed and taught executive MBA courses for the University of Maryland sponsored Polish American Management program at University of Lodz in Poland.

Director, Planning & Infrastructure, UUNET Technologies, 1998-2001

At UUNET he introduced new information technology that dramatically reduced product deployment cycles. Dr. Huneke managed new technology evaluation and deployment, systems architecture, quality assurance, software testing, data administration and database administration, capacity planning and security planning. He administered the IT division's budget, which was over \$60 million in expense and \$150 million in capital.

Vice President, Avatar Solutions, 1995-1998

Dr. Huneke was responsible for leading the company's production operations. As the company's business grew, he managed the company's operations from serving one client in Northern Virginia to multinational

operations serving clients on multiple continents. He directed operations to achieve the company's goals of consistently meeting and exceeding customer expectations.

Vice President, Disclosure, Inc., 1994-1995

For a financial information electronic publisher, he led a staff of 50 in the rapid development of products to meet market opportunities. Responsibilities included understanding the market so that developed products best met market needs and achieved competitive advantage. He was instrumental in redesigning business operations to dramatically reduce product cycle times from years to months.

Director, Freddie Mac, Reston, VA 1987- 1994

Dr. Huneke analyzed the competitive and technical environment facing Freddie Mac and sought opportunities to achieve superior economic returns. He directed projects that positioned Freddie Mac to improve business operations and use new technology for competitive advantage. He reviewed Freddie Mac lines of business and created product development plans for a new product cycle. Analyzed the productivity of systems development and evaluated the opportunities for gaining competitive advantage through reduced product cycle times. Dr. Huneke managed the preparation and administration of \$50 million budget for capital and other expenses.

Assistant Director, Intermodal Policy Division, Association of American Railroads, Washington, DC 1983-1987

For the Association, he managed research and analysis of key industry issues including vertical mergers, cost-benefit analyses of government projects and user fee impacts. Dr. Huneke directed competitive analyses of three industries including computer simulation of management strategies, new technology and comparative cost structure.

Senior Economist, DNS Associates, Washington, DC 1981-1983

In his first job in Washington while completing his dissertation, Dr. Huneke served as an analyst in the specification and development of automated management information systems. He analyzed the competitive effects of mergers and government regulation on the transportation industry.

Instructor and Research Assistant, University of Virginia, 1978-1981

Taught economic principles courses and worked on constructing an economic model of a consumer goods industry.

Publications

Book:

The Heavy Hand: The Government and the Union Pacific, 1862-1898, Garland Publishing, 1985.

Articles:

"The Uniform Regulatory Cost System: Implications for Transportation Management," (with Tom O'Connor and John M. Robinson) Proceedings of the Transportation Research Forum, 1983.

"Financial Performance of the Shallow Draft Barge Industry: Problems and Prospects," (with Kevin Horn and David Benforado) Proceedings of the Transportation Research Forum, 1985.

"Greater Efficiency or Predation: The CSX-ACBL Merger," (with L. Lee Lane and Thomas M. McNamara) Transportation Research Record 1038, Freight Papers--1985.

"A Competitive Analysis of United States Lines Round-the-World Service," (with L. Lee Lane and David J. Benforado) Proceedings of the Transportation Research Forum, 1986.

“A Comparison of Regulated and Exempt Towing Rates on the Inland Waterways: Implications for Deregulation,” (with Kevin Horn) Transportation Research Record, 1987.

“United States Lines’ Round-the-World Service: What Went Wrong?” (with L. Lee Lane and David J. Benforado) Intermodal Forum, Spring 1987.

“An Assessment of the Rail Competitive Motor Carrier Industry, 1977-1986,” (with K. Eric Wolfe and Vijaya Krishna) Journal of the Transportation Research Forum, 1987.

“Railroads, Historical Overview,” in The Oxford Encyclopedia of Economic History, Edited by Joel Mokyr, 2003.

“Road Transportation, Regulation,” in The Oxford Encyclopedia of Economic History, Edited by Joel Mokyr, 2003.

“Working Party No. 2 on Competition and Regulation, Roundtable on Structural Reform of the Rail Industry – United States,” (with Russell Pittman) Organization for Economic Co-operation and Development, February 2005.

“Role of STB Economists,” Journal of Transportation Law, Logistics and Policy, Fourth Quarter 2005.

“A Game Theory Approach to Railroad-Shipper Negotiations,” Journal of the Transportation Research Forum, Spring 2006.

“The Political Economy of Regulatory Costing: The Development of the Uniform Rail Costing System,” Journal of Transportation Law, Logistics and Policy, Third Quarter 2017.

“Open Access and Revenue Adequacy” in U.S. Freight Rail Economics and Policy: Are We on the Right Track?, Edited by Jeffrey T. Macher and John W. Mayo, Routledge, 2019.

Internet Blogs

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<https://www.railwayage.com/regulatory/observations-on-stbs-rate-reform-task-force-report/?RAchannel=home>

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<https://www.railwayage.com/regulatory/urcs-love-it-or-hate-it-were-stuck-with-it/?RAchannel=home>

“Convenience Fees, Profit Centers and Fuel Surcharges,” *Railway Age*, September 25, 2019
<https://www.railwayage.com/regulatory/convenience-fees-profit-centers-and-fuel-surcharges/?RAchannel=home>

“STB ‘Whack a Mole,’” *Railway Age*, November 20, 2019
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“When Should Regulation Supersede Market Processes?” *Railway Age*, February 12, 2020
<https://www.railwayage.com/regulatory/when-should-regulation-supersede-market-processes/?RAchannel=home>

“Put Aside Narrow Interests. Think About What’s Best,” *Railway Age*, June 12, 2020.
<https://www.railwayage.com/regulatory/put-aside-narrow-interests-think-about-whats-best/?RAchannel=home>

“Why CN’s Open Gateways Offer is a Big Deal” *Railway Age*, June 22, 2021
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Book Reviews

Stagecoach East, by Oliver W. Holmes and Peter T. Rohrbach, Journal of Economic History, March 1984.

The Rebirth of Missouri Pacific, 1956-1983, by H. Craig Miner, Journal of Economic History, December 1984.

The Southern Railway: Road of Innovators, by Burke Davis, Journal of Economic History, March 1986.

Performance of the U.S. Railroads Since World War II, by Kent T. Healy, Journal of Economic History, September 1986.

Public Transport, by Peter White, Journal of the Transportation Research Forum, 1996.

Merging Lines: American Railroads, 1900-1970, by Richard Sanders, Jr., EH.NET, 2002.

Urban Transportation Planning, by Michael D. Meyer and Eric J. Miller, Transportation Quarterly, Summer 2002.

Statistical and Econometric Methods for Transportation Data Analysis, by Simon P. Washington, Matthew G. Karlaftis and Fred L. Mannering, Journal of the Transportation Research Forum, Summer 2004.

21st Century Highways, edited by Wendell Cox, Alan Pisarski, and Ronald D. Utt, Journal of Transportation Law, Logistics and Policy, 2006

Public Transport in Developing Countries, by Richard Iles, Journal of the Transportation Research Form, 2007.

Commuting in America III: The Third National Report on Commuting Patterns and Trends, by Alan S. Pisarski, Journal of the Transportation Research Form, 2009.

Railroaded: The Transcontinentals and the Making of Modern America, by Richard White, Journal of the Transportation Research Form, 2012.

Harriman vs. Hill by Larry Haeg, Journal of the Transportation Research Form, Journal of the Transportation Research Form, 2014.

Unpublished Papers

"The Road to Ruin: The Union Pacific and the Sinking Funds Cases," Research Triangle Economic History Workshop, Chapel Hill, NC, March 1980.

"Jay Gould and the Financial Management of the Union Pacific," Western Economic Association Annual Meeting, Seattle, WA, July 1983.

"Efficiencies from Intermodal Ownership: The CSX-ACBL Merger," (with L. Lee Lane and Thomas M. McNamara) Transportation Research Forum Annual Meeting, Boston, MA, October 1984.

"Revolution in Rail-Truck Competition: The Advanced Truckload Firm," (with L. Lee Lane), Transportation Table, National Press Club, September 18, 1987.

"Inside the Software Microcosm," Southern Economic Association Annual Meeting, New Orleans, LA, November 1990.

“Are Banks like Trucking Companies or Pizza Parlors? Or Both!” (with Thomas M. McNamara) working paper. 1990.

“Freddie Mac Present and Future Lines of Business,” Freddie Mac white paper. 1990.

“Economics Education in Poland,” Southern Economic Association Annual Meeting, Atlanta, GA, November 1997.

“Railtrack and the Treatment of Railroad Infrastructure,” Surface Transportation Board working paper, 2001.

“A Mixed Strategies Approach to Railroad-Shipper Negotiations,” American Economic Association Annual Meeting, Boston, MA, January 2006.

Litigation Filings

Verified Statement for Association of Short Line and Regional Railroads in *Ex Parte 704 Sub No. 1, Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, January 29, 2021,

Declaration in Support Of Plaintiffs in *Lighthouse Resources Inc., et al, Plaintiffs, and BNSF Railway Co., Plaintiff-Intervenor, v. Jay Inslee, et al., Defendants, and Washington Environmental Council, et al., Defendant-Intervenors*, United States District Court, Western District of Washington at Tacoma, NO. 3:18-cv-05005-RJB.

Presentations

“The Political Economy of Regulatory Costing: The Development of the Uniform Rail Costing System,” Georgetown Railroad Colloquium, June 17, 2016.

“American Railroads: The Regulatory Perspective,” Brookings, Railroads, Policy, and the Economy, June 19, 2015.

“Research at the Association of American Railroads,” Transportation Research Board, Group I Council Summer Meeting, Washington, DC, September 1, 1987.

Education

Ph.D., Economics, University of Virginia
MA, Legal History, University of Virginia
BA, (Honors) Swarthmore College

Honors

Named outstanding teaching assistant, University of Virginia
National Merit Scholar
Dupont Fellow at University of Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSX Transportation, Inc.'s Petition to Reject Norfolk Southern's Minor Application in Finance Docket No. 36836 to be served electronically or by first class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi
Sally Mordi
Attorney for CSX Transportation, Inc.

February 27, 2025