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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

Ex Parte 711 (Sub No. 2)

COMMENTS OF THE VIRGINIA PORT AUTHORITY

Sarah McCoy, Esq.
Brianna Barnes, Esq.
Virginia Port Authority
101 W Main St.
Norfolk, VA 23510
(757) 683-8000

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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).

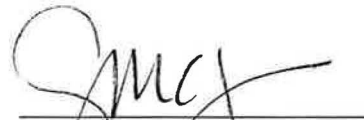
not matter whether a shipper had a contract with the rail carrier in instances in which a port seeks relief under the proposed rule.

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.
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COMMENTS OF THE PORT OF VIRGINIA
EXHIBIT A

