

October 21, 2010

*By Hand Delivery*

Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 204231

228036



RE: STB Finance Docket No. 42121; *Total Petrochemicals USA, Inc. v. CSX Transportation, Inc. et al.*

Dear Ms. Brown:

Enclosed please find an original and ten (10) copies of the **Public** version of Total Petrochemicals USA, Inc.'s Reply in Opposition to Motion for Expedited Determination of Jurisdiction Over Challenged Rates to be filed in the above referenced proceeding.

A CD is attached with a PDF copy of the Public version of the attached document.

Also, enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Handwritten signature of Jeffrey O. Moreno.

Jeffrey O. Moreno  
*Attorney for Total Petrochemicals USA, Inc.*

Enclosures

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**TOTAL PETROCHEMICALS USA, INC.**

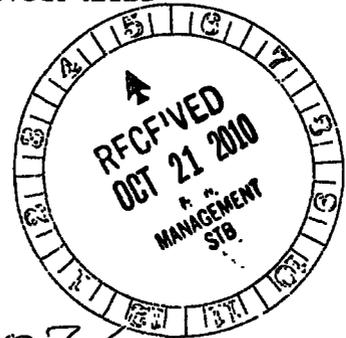
**Complainant,**

**v.**

**CSX TRANSPORTATION, INC; CAROLINA  
PIEDMONT DIVISION; GEORGIA  
WOODLANDS RAILROAD, LLC;  
MADISON RAILROAD; MOHAWK,  
ADIRONDACK & NORTHERN RAILROAD  
CORP.; NASHVILLE AND EASTERN  
RAILROAD CORP.; NEW HOPE &  
IVYLAND RAILROAD; PIONEER VALLEY  
RAILROAD; R.J. CORMAN RAILROAD  
COMPANY (MEMPHIS); SEMINOLE  
GULF RAILWAY L.P.; SEQUATCHIE  
VALLEY RAILROAD COMPANY; AND  
SOUTH BRANCH VALLEY RAILROAD**

**Defendants.**

**Docket No. NOR-42121**



**REPLY OF TOTAL PETROCHEMICALS USA INC.  
IN OPPOSITION TO MOTION FOR EXPEDITED DETERMINATION OF  
JURISDICTION OVER CHALLENGED RATES**

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**Jeffrey O. Moreno  
David E. Benz  
Thompson Hine LLP  
1920 N Street, N.W.  
Suite 800  
Washington, DC 20036  
Phone: (202) 331-8800  
Fax: (202) 331-8330**

**October 21, 2010**

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SURFACE TRANSPORTATION BOARD**

<b>TOTAL PETROCHEMICALS USA, INC.</b>	)	
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<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. NOR-42121</b>
	)	
<b>CSX TRANSPORTATION, INC; CAROLINA PIEDMONT DIVISION; GEORGIA WOODLANDS RAILROAD, LLC; MADISON RAILROAD; MOHAWK, ADIRONDACK &amp; NORTHERN RAILROAD CORP.; NASHVILLE AND EASTERN RAILROAD CORP.; NEW HOPE &amp; IVYLAND RAILROAD; PIONEER VALLEY RAILROAD; R.J. CORMAN RAILROAD COMPANY (MEMPHIS); SEMINOLE GULF RAILWAY L.P.; SEQUATCHIE VALLEY RAILROAD COMPANY; AND SOUTH BRANCH VALLEY RAILROAD</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

**REPLY OF TOTAL PETROCHEMICALS USA INC.  
IN OPPOSITION TO MOTION FOR EXPEDITED DETERMINATION OF  
JURISDICTION OVER CHALLENGED RATES**

TOTAL PETROCHEMICALS USA, INC. (“TPI”), hereby replies in opposition to the “Motion for Expedited Determination of Jurisdiction Over Challenged Rates” (“Motion”), filed by CSX Transportation, Inc. (“CSXT”) on October 1, 2010. By asking the Board to determine market dominance in this proceeding before it considers rate reasonableness, CSXT’s Motion constitutes an improper collateral attack on the procedural schedule to which the parties previously had agreed and the Board adopted in its decision served on June 23, 2010. The Board does not typically separate the market dominance and rate reasonableness phases of a rate case

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unless “the evidence submitted by the defendant rail carrier raised considerable doubts as to the complainants’ ability to demonstrate market dominance.” Gov’t of the Territory of Guam v. Sea-Land Service, Inc. et al., STB Docket No. WCC-101, slip op at 6 (served Feb. 2, 2007) (“Guam”). Despite CSXT’s self-serving assertion that the lack of market dominance in this case is “so compelling,” Motion at 1, one needs only to scratch the surface to expose the vastly incomplete and grossly distorted nature of CSXT’s analysis. As TPI demonstrates in this Reply, there is no basis in law or fact for granting CSXT’s Motion.

TPI does not attempt to present its entire market dominance evidence in this Reply both because it could not do so in the 20 days provided by the Board’s rules, and more importantly, because it is not required to do so under the current procedural schedule absent a specific Board order. Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, Ex Parte No. 527, 1 STB 754, 760, n. 10 (1996) (“Expedited Procedures”). Based solely upon the procedural and equitable arguments presented in Part I, below, the Board has ample grounds to deny CSXT’s Motion. Nevertheless, in Parts II and III, TPI presents abundant evidence to demonstrate that market dominance is not the “open and shut” case that CSXT contends, and therefore, that CSXT has not carried its burden to demonstrate that the Board should deviate from its procedural schedule in this case by raising “considerable doubts” upon TPI’s ability to demonstrate market dominance. Guam, slip op at 6.

TPI’s Reply is presented in five parts. Part I presents the legal standard for bifurcating market dominance from rate reasonableness evidence, and explains why the Board should deny CSXT’s Motion as both procedurally improper and fundamentally unfair to TPI. Part II provides an overview of TPI’s distribution network in order to paint a clear picture of what transportation options are, or are not, feasible. Part III responds directly to the market dominance evidence

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presented in CSXT's Motion. Part IV responds to CSXT's "Paper Rates" argument. Part V summarizes why the Board should deny CSXT's Motion. TPI's Reply is supported by various exhibits and by the Verified Statement of Allen Cast, who is TPI's Manager, T&D Sourcing and Strategy ("Cast V.S.")

**I. CSXT's MOTION IS PROCEDURALLY IMPROPER AND FUNDAMENTALLY UNFAIR TO TPI.**

CSXT's Motion is a unique and unprecedented variation upon motions to bifurcate the market dominance and rate reasonableness issues in rate cases. Similar to a motion to bifurcate, CSXT asks the Board to receive evidence upon and decide the issue of market dominance prior to receiving rate reasonableness evidence. Unlike a motion to bifurcate, however, CSXT asks the Board to decide market dominance on the basis of the evidence submitted in its Motion and any evidence submitted in TPI's Reply. See Motion at 24 (asking that the Board order TPI to submit its market dominance evidence in reply to the Motion and then issue a decision). This would turn the procedural schedule on its head, and deny TPI a fair opportunity to present market dominance evidence in accordance with the procedures adopted by the Board. 49 C.F.R. § 1111.8(a).

The procedural schedule in this case provides for three rounds of evidence on all issues. As the party with the burden of proof, TPI presents its evidence first. CSXT then replies to TPI's evidence, and TPI submits rebuttal evidence in response to CSXT. In contrast, CSXT's Motion contemplates two rounds of evidence, in which CSXT goes first followed by TPI. Moreover, while the procedural schedule provides four months between the three rounds of evidence, CSXT would require TPI to submit its complete market dominance case in just the 20 days provided by the Board's rules for responding to Motions. 49 C.F.R. § 1104.13(a). TPI had no forewarning of this Motion, which CSXT chose to file at a time convenient to it, in contrast to a procedural

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schedule with filing dates established months in advance. CSXT also filed its Motion on October 1, 2010, which is two weeks before the close of discovery in this proceeding and just two days after CSXT produced its first responses to TPI's discovery requests on market dominance, which TPI had served on May 17, 2010. These facts demonstrate that CSXT's Motion is both premature and fundamentally unfair.

Nearly a decade ago, the Board decided that market dominance should not be bifurcated from rate reasonableness evidence. In the Interstate Commerce Commission Termination Act ("ICCTA"), Congress directed the newly-created STB to establish procedures to expedite rail rate challenges. 49 U.S.C. 10704(d). In response to this directive, the Board proposed to no longer bifurcate market dominance and rate reasonableness determinations:

The number and timing of evidentiary filings can also greatly affect the length of a rate reasonableness proceeding. For example, in a rate case we can proceed with the market dominance and rate reasonableness phases sequentially or simultaneously. In some cases in the past, the ICC conducted the two phases of the case sequentially; only if it found market dominance did the ICC schedule the filing of rate reasonableness evidence. More recently, the ICC provided for the market dominance and rate reasonableness evidence to be filed simultaneously. The sequential procedure can extend the time needed to close the record, but has the advantage of sparing the parties the expense associated with presenting evidence on the reasonableness of a rate in cases where the carrier is found not to possess market dominance. The simultaneous procedure allows faster completion of the record, but always requires the parties to incur the expense of filing evidence on the reasonableness of a rate.

61 FR at 11801. After carefully balancing these competing considerations, the Board ultimately adopted a procedural schedule with simultaneous filing of market dominance and rate reasonableness evidence that it declared "will not be altered absent a specific Board order."

Expedited Procedures, 1 STB at 760, n. 10.

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A fair and proper sequential procedural schedule responsive to CSXT's Motion would add 6-9 months to the current procedural schedule, in order to accommodate three rounds of evidence and sufficient time for a Board decision. The parties then would require several additional months to prepare rate reasonableness evidence based upon the Board's market dominance decision. The current procedural schedule in this case already allows 27 months between the filing of TPI's Complaint and the deadline for a final Board decision. A bifurcated proceeding would extend the schedule to an unacceptable three years or longer.

For car load shippers, such as TPI, the length and cost of SAC cases is a greater deterrent to pursuing regulatory rate relief than it is for unit train coal shippers, which historically have been the only shippers able to economically justify the time and expense of a rate case. Unlike unit train coal shippers, which tender a single commodity in enormous volumes between the same two points year after year, TPI has hundreds of customers which are constantly changing and which order product in volumes ranging from a handful of rail cars to a few hundred rail cars annually. Some current customers may no longer be customers by the time this rate case ends, and TPI may have new customers that might not be covered by a rate prescription in this case. Furthermore, TPI's ability to retain existing customers, and to win new customers, will in part be determined by the rail rates that it must pay CSXT.

The CSXT tariff rates that TPI has challenged in this proceeding are punitively high, because CSXT is fully aware of these facts and has set its tariff rates to deter rate cases. For example the difference between CSXT's last effective contract rate to TPI and its tariff rates is as high as {REDACTED}.<sup>1</sup> Cast V.S., Ex. 1 The tariff rates on 54 case lanes increased by {REDACTED}

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<sup>1</sup> Pursuant to the Protective Order in this proceeding, TPI has delineated "CONFIDENTIAL" information by single brackets {REDACTED}, and "HIGHLY CONFIDENTIAL" information by double brackets {{REDACTED}}.

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{█}, and the tariff rates on 13 case lanes increased by more than {█}. {{█  
█  
█  
█}} Consequently, a longer procedural schedule only increases the cost and risk to TPI.<sup>2</sup> Thus, the Board's reasons for expediting rate cases by requiring the simultaneous filing of market dominance and rate reasonableness evidence are even more justified in this case than they were for the coal cases that dominated the Board's rate case docket in 1996, when the Board decided that a simultaneous procedural schedule was in the public interest.

CSXT's claim that "consideration of market dominance now could spare the parties and the Board significant amounts of unnecessary expense and wasted effort" distorts reality. Much of the heavy lifting for a stand-alone cost ("SAC") case comes in the discovery phase, which is nearly concluded in this proceeding. Furthermore, if the procedural schedule is bifurcated, TPI cannot simply stop working on its SAC evidence until the Board issues a market dominance decision. The current procedural schedule allows four months from the close of discovery for TPI to prepare its opening evidence. Yet, CSXT contemplates that the Board would receive market dominance evidence and issue a decision without altering the due date for filing opening evidence on February 16, 2011. Motion at 4. Because that could leave TPI with two months or less to prepare opening evidence, any decision to stop preparing its rate reasonableness evidence

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<sup>2</sup> CSXT might contend that this is a reason to bifurcate this proceeding, because TPI would learn at an earlier stage whether it would get any relief on certain lanes due to a lack of market dominance. But, even though TPI might learn that certain lanes would not obtain relief, those lanes still would be exposed to CSXT's punitive tariff rates while TPI pursued the rate reasonableness phase of its case on the lanes over which CSXT is market dominant, because CSXT will not contract with TPI on an *a la carte* basis for the case lanes. Cast V.S. at ¶ 55. The principal impact on TPI will be the need to pay those tariff rates for a longer time period than it would under a consolidated procedural schedule.

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while the Board determines market dominance would be very risky. The only party that might be spared some expense is CSXT in its Reply Evidence, and then only if the Board concludes that CSXT lacks market dominance over most of the case lanes.

CSXT has not demonstrated good reason to alter the careful balancing of interests that the Board performed when it decided not to bifurcate the market dominance and rate reasonableness determinations. Moreover, because any extension of the procedural schedule to accommodate CSXT's Motion would cause TPI to suffer far greater harm by having to pay CSXT's punitively high tariff rates for an even longer period of time, the equities strongly militate against bifurcating the procedural schedule.

**II. OVERVIEW OF TPI'S DISTRIBUTION NETWORK.**

Before the Board can effectively evaluate CSXT's market dominance over the TPI lanes in this case, it is important to understand how TPI's sales and distribution network functions and the options that are available to TPI for supplying its customers.

**A. Product And Customer Overview.**

TPI's Complaint covers the transportation of five basic products: polypropylene, polyethylene<sup>3</sup>, polystyrene, aromatics, and styrene. The first three can be described as "polymers" and are, generally speaking, plastic pellets, while the last two are hazardous liquids. *Cast V.S.* at ¶ 6. However, the great variety of end uses to which TPI's products are put means that TPI's customers require adherence to very detailed specifications, especially for polypropylene, polyethylene, and polystyrene.

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<sup>3</sup> This is also known as polyethylene HD, with "HD" signifying high density. All of TPI's polyethylene is of the high density variety; therefore, any reference to polyethylene is synonymous with polyethylene HD.

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Specifically, TPI currently has {█} active grades of polypropylene, {█} active grades of polyethylene, {█} active grades of polystyrene, {█} active grades of aromatics, and {█} active grades of styrene. Id. at ¶ 7. For the vast majority of TPI's customers, substitution of one grade of product for another is not possible without recalibrating and/or retooling the customers' production facilities. Id. at ¶ 6-7. In other words, when a TPI customer orders a specific grade of product, TPI must manufacture and send a product that matches the customer's specifications; if not, the product will be returned at TPI's expense. Id. at ¶ 7. In short, the grades are not interchangeable.

In addition to end-users, TPI's customers also include brokers. Brokers usually sell to end-users that buy in small quantities and/or do not meet TPI's credit standards. Id. at ¶ 8. The broker purchases the product from TPI in large quantities and resells it to the end-user. Id. The broker may instruct TPI to ship the product directly to the end-user, without ever touching the product itself; the broker may be a compounder which modifies the product (e.g. adds pigment) before reselling it to an end-user; or the broker may direct TPI to deliver the product to a bulk terminal from which the broker re-sells the product in smaller truckload quantities. Id. These arrangements allow TPI to obtain additional sales that would not be possible otherwise. TPI often does not know the identity of the end-user in such cases. Id. From TPI's perspective, brokers are its customers, not the ultimate end-user. Id.

Some of TPI's customers utilize off-grade polymer products. "Off-grade" signifies that the product does not meet the strict specifications of any particular polymer grade; instead, the product has a wide specification range within the same lot. Id. at ¶ 11. Each batch of off-grade product is different, and the off-grade market is very price-driven. Id. TPI only sells off-grade products in railcars because TPI does not store off-grade product or even intend to produce it.

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Id. at ¶ 12. Off-grade sales occur whenever TPI produces product that fails to meet specifications of a particular grade. Customers who order off-grade product generally want to receive all of a particular batch at the same time, because they must recalibrate their facilities for each unique batch. Id.

TPI also engages in consignment sales, which means that TPI owns the product, and does not receive payment from the customer, until the customer “taps” the rail car containing the product (i.e., the customer begins unloading). Id. at ¶ 13. When a customer buys on consignment, the transportation must be by railcar because, unlike privately-owned rail cars, trucks cannot be used for storage. Id. Consignment sales allow TPI to garner additional business because the customer has extra time to pay TPI for the product. Id. Unlike a normal shipment, where TPI invoices the customer as soon as the shipment leaves TPI’s control at the production facility or a local SIT yard, TPI does not invoice the customer in a consignment sale until the railcar is tapped. Id.

**B. Transportation of Polymers.**

At TPI’s three polymer facilities, all product is loaded directly into railcars upon production or blending. Cast V.S. at ¶ 19. Trucks are not directly loaded because the silos at all three polymer facilities are sized in units of railcar capacity for quality control purposes. Id. The polymer industry generally engages in quality control via, and customers often order product in, lots that are railcar sized. Id. Therefore, regardless whether the end-user takes delivery of TPI’s polymer products by rail or by truck, the first stage in the transportation network is always by rail. The transportation options differ slightly for each polymer product after it is loaded onto rail cars.

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TPI produces polypropylene at its La Porte, Texas, facility. La Porte is served by the Port Terminal Railroad Association (“PTRA”). Cast V.S. at ¶ 20. This is the largest polypropylene facility in the world, with a capacity of 2.7 billion pounds per year. TPI currently has {█} active grades of polypropylene, and there may be up to {█} specifications within each grade. Id. at ¶ 21.

TPI produces polyethylene at its plant in Bayport, Texas. Cast V.S. at ¶ 26. Both the Union Pacific Railroad (“UP”) and the BNSF Railway (“BNSF”) have access to Bayport. Id. Currently, BNSF originates all of TPI’s rail traffic at Bayport. Id. This facility has a capacity of 900 million pounds per year. Id. TPI currently has {█} active grades of polyethylene, and some grades have further sub-specifications. Id.

TPI produces polystyrene at a plant within its Styrenics Complex in Carville, Louisiana, which may also be called Bruns. Cast V.S. at ¶ 29. This facility has a capacity of 1.65 billion pounds per year, and is the largest polystyrene facility in the world. Id. It is located on a rail line of the Canadian National Railway (“CN”). Id. TPI currently has {█} active grades of polystyrene. Id.

Due to the many different grades of these three polymers, TPI must produce each grade in large batches and store them until sold. Cast V.S. at ¶ 21, 26, and 30. {█}

{█} Id. The silos are used for blending of product, but cannot be used for storage due to the continual need to blend new production. Id. Each silo has a capacity equal to one railcar. Id. Therefore, upon production, TPI immediately loads polymers onto rail cars.

TPI does not have rail car storage track at La Porte. {█}

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[REDACTED] } Cast V.S. at ¶ 22. { [REDACTED]

[REDACTED]

[REDACTED] } } Id.

Unlike La Porte, Bayport and Carville have a small amount of track space for railcar storage. Cast V.S. at ¶ 27 and 31. This allows TPI to ship polyethylene and polystyrene directly from Bayport and Carville by both rail and truck. All trucks, however, must be loaded from a rail car. Id. When the plant storage tracks are full, rail cars from Bayport are sent to [REDACTED] [REDACTED], and rail cars from Carville are sent to SIT yards on the CN [REDACTED] [REDACTED] } } Id.

Transportation beyond a plant or SIT yard depends upon whether the customer is a rail or a truck customer. If a customer has access to direct rail service, it is almost always a rail customer; all other North American customers are truck customers. Id. at ¶ 22 and 39.

A rail car may be transported directly from a SIT yard to the customer's facility, or it may make an intermediate stop at a lease track. [REDACTED]

[REDACTED]

[REDACTED] } Cast V.S. at ¶ 17 and 23. This is especially important if the customer lacks sufficient track capacity within its facility. [REDACTED]

[REDACTED] } } Id. at ¶ 45.

All truck shipments of polymers follow one of two options, depending upon whether the truck delivery is to a regular truck customer or a regular rail customer. For its regular truck customers, TPI ships rail cars to bulk terminals near to the customer and within TPI's approved distribution network for transload onto trucks that will make the final delivery. Id. at ¶ 24, 28, and 33.

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When a customer who normally desires and receives polymers by rail requests truck delivery, TPI first determines if the requested product grade and specification is already located at a bulk terminal near the customer. *Id.* at ¶ 25, 28, and 33. If yes, TPI determines whether product can be taken from that terminal – in other words, whether it would cause problems to other (i.e. truck) customers if product were used for the rail customer. *Id.* If no product is available at a nearby bulk terminal, then TPI will make the same inquiry at other terminals progressively further away. *Id.* If no product is available at any bulk terminal, then product must come from a rail car stored at the plant, if available, or a SIT yard. *Id.* A SIT yard is the choice of last resort, because it is the most costly. *Id.*

**C. Transportation of Hazardous Liquids.**

CSXT's Motion does not challenge CSXT's market dominance over movements of styrene and aromatics, which are hazardous liquids. Motion at 16, n. 13. Only three such movements remain in TPI's Second Amended Complaint: Lane Nos. 16, 30 and 64. Therefore, TPI will not address those products in this Reply.

**III. CSXT'S MARKET DOMINANCE EVIDENCE IS INCOMPLETE AND DISTORTED.**

In reaching its conclusion that the lack of market dominance is "compelling," CSXT fails to consider all of the factors that are relevant to the market dominance determination, and distorts those factors that it does consider. CSXT presents most of its market dominance evidence through its witness Gordon Heisler. CSXT's choice of Mr. Heisler is troubling because, as a member of the consulting firm Professional Logistics Group, Inc., Mr. Heisler was part of a team that advised TPI in 2007 on its Eastern rail transportation strategies, including contract negotiations with CSXT, and that work was the subject of a confidentiality agreement. *Cast V.S.* at ¶ 34, Ex. 2. It also is very important to note that the result of those contract negotiations was a

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two-year contract with an increase of 38% in the volume weighted average of CSXT's rates to TPI. *Cast V.S.* at ¶ 35. If truck and transload options were the effective constraint upon CSXT's rates that Mr. Heisler suggests, it is unfathomable that PLG's advice to TPI in 2007 should have resulted in such a steep rate increase. Mr. Heisler has no credibility when he argues one set of facts when working for TPI and another set when working for CSXT.

Through Mr. Heisler, CSXT challenges its market dominance over TPI's traffic on four grounds. First, Mr. Heisler identifies eight lanes that he contends have direct rail competition. Second, Mr. Heisler identifies one lane that he contends lacks market dominance because the destination is a bulk terminal for rail-truck transloads. Third, Mr. Heisler contends that TPI can transload economically at the current interchange points between TPI's origin carriers and CSXT for 18 lanes. Fourth, Mr. Heisler contends that TPI can transload economically at bulk terminals within 200 miles of the destinations in 78 case lanes. In this Reply to CSXT's Motion, TPI provides a far more complete and accurate picture of market dominance that soundly rebuts CSXT's characterizations.

**A. CSXT Has Incorrectly Identified Direct Rail Competitive Options.**

CSXT wrongly concludes that there are lanes in this case that are subject to direct rail competition. The specific lanes mentioned by CSXT are: 18, 40, 44, 47, 67, 108, 109, and 110. *Motion* at 9-10; *Heisler V.S.* at 6-7.<sup>4</sup> Of these eight lanes, numbers 40, 44, and 47 were removed from this case in TPI's Second Amended Complaint on October 4, 2010.<sup>5</sup> The five remaining lanes do not have two-carrier rail service, contrary to CSXT's assertions.

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<sup>4</sup> Although Mr. Heisler also included lane 70 in Exhibits 1 and 2 of his Verified Statement, which lists lanes with direct rail competition, he explicitly states that "there is not direct rail competition" on Lane 70 in the narrative of his Verified Statement. *Heisler V.S.* at 8.

<sup>5</sup> In fact, TPI informed CSXT of TPI's intent to remove lanes 40 and 47 from the case in a September 20, 2010 letter, which is 11 days before CSXT filed its Motion. See *TPI Reply*



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the AB, who confirmed that the CSXT serves { [REDACTED] } in Akron, and not his railroad. Id.

**3. Lanes 109 and 110: Chicago-Lima**

CSXT incorrectly labels these lanes as “Chicago – Indianapolis” on page 10 of its Motion. These lanes actually cover Chicago to Lima, Ohio, which is correctly stated in the Heisler V.S. at 7. Polyethylene is the commodity in Lane 109 and Polypropylene is the commodity in Lane 110. CSXT incorrectly claims that the destination is served by the Indiana & Ohio Railway (“IORY”), which allegedly would enable a connection to NS. Motion at 10; Heisler V.S. at 7. The destination in Lima is a CSXT captive facility operated by { [REDACTED] }, which operates two separate facilities on CSXT and the IORY. TPI’s customer, { [REDACTED] }, requires TPI to ship to { [REDACTED] }, which is in the CSXT yard.<sup>6</sup> Cast V.S. at ¶ 62. The address of { [REDACTED] } on the IORY is { [REDACTED] }. Id. Moreover, { [REDACTED] } has confirmed to TPI that the IORY facility is at full capacity, which would explain why TPI must ship to the CSXT location. Cast V.S., Ex. 3. The bottom line is that the { [REDACTED] } destination for these movements is captive to CSXT.

**B. CSXT Possesses Market Dominance, Even at Transload Bulk Terminals, When TPI Does Not Select the Terminal.**

CSXT and Mr. Heisler include Lane 70 (New Orleans – Chattanooga) in a separate market dominance category all to itself, because it is a transload facility. Motion at 12-13; Heisler V.S. at 8. CSXT concedes that there is not direct-rail competition to this destination, but contends that market dominance is lacking because there is alternative rail transportation to a

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<sup>6</sup> Although TPI has shipped to more than one customer in Lima through { [REDACTED] } is TPI’s principal customer with the greatest volume. Cast V.S. at ¶ 62.

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nearby transload facility. CSXT has omitted additional facts, however, that clearly establish its market dominance.

When the destination is a bulk terminal transload facility, the Board must evaluate market dominance differently based upon whether TPI or its customer has selected the facility and is responsible for the subsequent truck transportation. Where the rail shipper, such as TPI, selects the bulk terminal as part of its distribution network that includes rail and bulk truck intermodal transportation to an end-user customer, TPI has greater flexibility to shift that traffic to a different terminal. In contrast, when the receiver, which is TPI's customer, selects the bulk terminal and is responsible for arranging the continuing transportation by truck to the end-user, the bulk terminal location is as fixed, from TPI's perspective, as it is when TPI ships directly to a customer that is the end user of the product.

This is a common situation faced by TPI when the customer is a broker or reseller of TPI's product. Many brokers operate out of bulk terminals where they have private agreements with the bulk terminal operator. *Cast V.S.* at ¶ 36, 47, and 48. Title to the product transfers to the broker upon shipment of a railcar from TPI, whereas title to the product typically would remain with TPI when the terminal is merely an intermediate storage point in the transportation from TPI to a customer who also is the end-user. *Id.* at ¶ 47. The broker is responsible for arranging the final delivery to the end-user. *Id.* TPI has no further involvement in the transportation once rail delivery is completed to the broker, and indeed, often does not even know the identity and ultimate location of the end-user, which is the customer of the broker, not TPI. *Id.* at ¶ 8.

A broker may prefer one bulk terminal over another for a variety of reasons. These may include terminal capacity, proximity to the broker's customers, and the ability of the broker's

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contract motor carrier to access that terminal. Id. at ¶ 48. In order to secure favorable rates and reserved capacity, a broker also may enter into long-term leases with a specific terminal Id. TPI is not privy to the specific reasons that its broker-customers require TPI to ship product to a specific terminal. Id.

In the case of Lane 70, although a broker is not involved, a comparable set of facts exist. TPI sells polypropylene to {REDACTED}, which takes delivery at a CSX TRANSFLO bulk terminal. The customer, not TPI, has selected this particular terminal, and the customer, not TPI, is responsible for the truck transportation from the terminal to the customer's facility. Cast V.S. at ¶ 63. Unlike most similar cases involving brokers, however, we know why the customer insists upon the CSX TRANSFLO terminal. {{REDACTED}}

}}<sup>7</sup> Because this is a factor over which TPI has no control, and which does not accrue to TPI's benefit, CSXT clearly possesses market dominance over Lane 70.<sup>8</sup>

That same CSXT document is compelling for another reason. {{REDACTED}}  
}} By comparison, CSXT's tariff rate is \$5681, excluding fuel, which would yield a profit to CSXT of

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<sup>7</sup> TPI Reply Exhibit 4, CSX-TPI-HC-029232.

<sup>8</sup> {{REDACTED}}  
}} A copy is attached as TPI Reply Exhibit 5. CSXT's statement misses the point. So long as TPI's customer, not TPI, determines the destination, TPI's inability to change the routing establishes CSXT's market dominance. {{REDACTED}}

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nearly {{[REDACTED]}}. Therefore, it defies logic to conclude that the availability of a nearby NS bulk terminal is an effective competitive constraint upon CSXT's rate.

**C. Bulk Terminal Transloads Are Not Viable Options For The Issue Traffic.**

The majority of CSXT's Motion argues that rail-truck intermodal transportation, by routing around CSXT, provides effective competition for 92 case lanes.<sup>9</sup> See Heisler V.S. at 9-15, and Exhibits 3 and 5. CSXT erroneously draws the conclusion that rail-truck transloading is an effective competitive constraint upon its rates based upon the fact that TPI already ships large volumes of the issue products by truck. But, the mere fact that TPI ships a commodity by truck to some customers does not establish market dominance over the issue traffic.

Nearly thirty years ago, the ICC recognized that "the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted." Market Dominance Determinations and Consideration of Product Competition, 365 I.C.C. 118, 133 (1981), affirmed sub nom. Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (en banc). See also, Product and Geographic Competition, 2 I.C.C. 2d 1, 21 (1985). However, whether or not such competition is effective requires consideration of: (i) physical characteristics of the product in question that may preclude transportation by motor carrier; (ii) the amount of the product in question that is transported by motor carrier where rail alternatives are available; (iii) the amount of the product that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail; and (iv) the transportation costs of the rail and motor carrier alternatives. Id. CSXT has presented incomplete evidence only as to the first and fourth factors, while ignoring the second and third factors altogether.

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<sup>9</sup> This is the total number of lanes in Heisler Exhibits 3 and 5, less the duplicates.

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**1. The case customers receive the overwhelming volume of their shipments from TPI via rail.**

While Mr. Heisler discusses the truck volumes shipped by TPI to all of its North American customers in the aggregate, he makes no attempt to examine the truck and rail volumes received by the customers in each case lane. Specifically, he notes that TPI has shipped at least {{[REDACTED]}} truckloads of the issue commodities from 2006 through June 30, 2010. Heisler V.S. at 9-10. This volume, however, includes shipments to customers that do not have access to rail, emergency shipments to regular rail customers, and shorter distance movements, which are more competitive with rail transportation. Thus, that statistic, and other aggregated numbers tossed around by Mr. Heisler, reveal very little about CSXT's market dominance over the issue traffic.

For the overwhelming majority of the case lanes, less than 10% of the total volume received at each destination was delivered by truck from 2006 through June 30, 2010, and 57 of those lanes have no truck history at all. This is summarized for each case lane in Exhibit 4 of the Cast Verified Statement.<sup>10</sup> Because more than one customer may exist at a destination, Mr. Cast has presented the truck data in his Exhibit 4 by both the total trucks received by all TPI customers at the destination and by just the case customer(s) at the destination. This break out shows that, in some lanes, the truck volumes are attributable mostly, if not entirely, to customers that are not rail-served.

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<sup>10</sup> The high percentage of truck movements for two lanes is misleading. In Lane 56 (Chicago-Terre Haute), because the customer {{[REDACTED]}} is the same customer in Lane A-2 (Clinton-Atherton), the {{[REDACTED]}} trucks received since 2006 in Lane 56 must be compared with the {{[REDACTED]}} rail cars in Lane A-2, which amounts to only {{[REDACTED]}} trucks. See Cast V.S. at ¶ 52. For Lane 103 (New Orleans-Beech Island, SC), {{[REDACTED]}} rail cars are not shown in Cast Exhibit 4 because, from February through October 2006, they moved over the Memphis gateway, before routing protocols shifted this traffic over the New Orleans gateway. *Id.* at ¶ 53. When this rail car volume is included, trucks accounted for only {{[REDACTED]}} of deliveries to this location. Moreover, all {{[REDACTED]}} trucks were delivered in January-February 2006, which strongly suggests that they were for testing the product before the customer began purchasing larger volumes by rail in the following months. *Id.*

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The fact that very few trucks are received by case lane customers with rail access constitutes evidence that truck competition is not an effective competitive alternative for the issue traffic.

2. **CSXT cannot reroute substantial volumes of the issue traffic through bulk terminals without regard for the available capacity at those terminals.**

A critical factor in TPI's ability to shift all-rail movements to rail-truck transload alternatives is the existence of available bulk terminal and truck capacity to handle that traffic. Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976, 353 ICC 874, 929 (1976) ("Special Procedures"). Although Mr. Heisler states that he "confirmed that those transloading facilities [identified by him as competitive alternatives] have the capacity and capability to handle rail-truck transloading of the issue traffic," there is almost no evidence of that in his testimony or work papers. Heisler V.S. at 3. The volume of traffic that Mr. Heisler proposes to move through some of these bulk terminals clearly proves that he has not in fact considered their available capacity.

Bulkmatic operates nine of the bulk terminals identified in Heisler Exhibit 7. According to { [REDACTED] } of Bulkmatic, he had conversations and exchanged emails with Mr. Heisler, who represented that he was working on a large distribution project, and couldn't discuss the details, or who was the shipper. Cast V.S. at ¶ 37. Mr. Heisler asked { [REDACTED] } for the overall capacity of the Bulkmatic transload terminals and whether they were full, but he did not ask about the available capacity. *Id.* It is clear that Mr. Heisler's questions, whether carefully calibrated or carelessly remiss, failed to elicit an accurate picture for the Board.

For example, Mr. Heisler has suggested re-routing no fewer than 18 case lanes through the NS Thoroughbred bulk terminal in Doraville, GA, which is the most of any bulk terminal



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Finally, even if Mr. Heisler could demonstrate that certain low volume case lanes could be handled via a transload alternative, it would not be appropriate for the Board to determine market dominance for each lane in isolation from the others, as CSXT has suggested.<sup>11</sup> For example, assume that there are ten case lanes with fewer than five rail cars per year in each lane, and that there is sufficient bulk terminal and motor carrier capacity to absorb a total of five cars annually. An isolated market dominance analysis of each lane would conclude that there is sufficient bulk terminal and motor carrier capacity to handle the volume in each lane. But on an aggregate basis, there truly is only sufficient capacity to shift one lane to truck, while the other nine remain captive to rail. Therefore, a finding of market dominance for all ten case lanes would be appropriate.

This is a critical factor because real-world rate negotiations take place on an aggregated basis, not lane-by-lane. CSXT would not offer TPI separate contract rates for each case lane; it offered rates as a package. *Cast V.S.* at ¶ 55. While some lanes may be reasonably priced in a contract offer, other lanes are not. TPI must evaluate such rate offers on an aggregate basis, because CSXT only offers those rates on an aggregate basis. Because the real world operates on this all-or-nothing approach, it is essential that the Board consider market dominance evidence on this same basis. Any other conclusion would ignore the reality of TPI's bargaining posture. CSXT will always know that TPI can only divert isolated lanes, while still leaving CSXT with sufficient market power over the balance of TPI's traffic to extract its monopoly profits, and that TPI will not have any regulatory remedy.

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<sup>11</sup> See Motion at 21 (“[T]his is a SAC case built on over a hundred small movements, none of which involves a volume so large as to make all-rail transportation the only viable option.”).

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**3. TPI cannot use just any bulk terminal.**

CSXT's witness Heisler proposes to reroute the issue traffic via 37 different bulk terminals based primarily upon cost. TPI, however, will not use just any terminal to transport its products. Moreover, TPI attempts to limit the number of terminals it uses in order to maximize efficiency. In order to provide TPI's customers with the best possible service at the optimal cost to TPI, all bulk terminals must be reviewed and approved to be a part of TPI's product distribution network. *Cast V.S.* at ¶ 40-44.

"Optimal Cost" does not mean the absolute lowest cost. TPI also evaluates a bulk terminal's safety processes and procedures; security (e.g. fencing, lighting); capacity; paved loading areas; and motor carriers with access to the facility. *Id.* at ¶ 43. TPI has a checklist of the items that it reviews when auditing a facility for its distribution network, *id.*, Ex. 7, and for new facilities, *id.*, Ex. 8.

Too many bulk terminals also increases TPI's inventory costs. Multiple terminals means that TPI must store more product at more locations than it otherwise would if the inventory was more centralized. *Cast V.S.* at ¶ 41. This problem is magnified by the large number of grades and specifications of the issue commodities. *Id.* In addition, TPI must carry more inventory for customers at a bulk terminal than when the customer is served directly by rail, because the entire transit time through bulk terminals to the customer is longer. This increases both TPI's inventory carrying costs and its rail car fleet requirements. *Id.*

TPI has conducted two terminal optimization projects in just the past four years. Both projects concluded that the optimal number of terminals for TPI is {{ [REDACTED] [REDACTED] }}. Therefore, TPI strives to maintain a terminal network of this size. *Id.* at ¶ 42.

Mr. Heisler identifies 34 terminals for transloading the issue traffic, {{ [REDACTED] [REDACTED] }}. *Heisler V.S.*, Ex. 7.

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Furthermore, only five of those terminals currently are part of TPI's approved network, and a sixth is currently undergoing certification by TPI. *Cast V.S.* at ¶ 44, Ex. 6. Three of those terminals would not meet TPI's minimum requirements for certification. The KBSR Raub Yard, at Earl Park, IN, is just a rail siding and a scale located on a farm; the PAL Princeton, KY facility lacks paving, fencing, and lighting, and has only a five rail car capacity; and the NS Thoroughbred terminal, at Pittsburgh, PA, lacks fencing.<sup>12</sup> *Id.* at ¶ 44, Ex. 6. Because Mr. Heisler's work papers lack information on eleven of the bulk terminals in his Exhibit 7, TPI has not evaluated them. *Id.* at ¶ 44. Even if TPI could use every one of the terminals identified by Mr. Heisler, TPI would have to {{ [REDACTED] }} the size of its current network at significant added cost.

**4. CSXT's flawed transload cost estimates do not establish effective competition.**

CSXT incorrectly contends that, if TPI can transport the issue commodities around CSXT via a rail-truck transload at similar or lower rates to CSXT's tariffs, CSXT is not market dominant. Mr. Heisler purports to present evidence that TPI has such transload alternatives to CSXT at comparable or lower rates. *Heisler V.S.* at 14 and Exhibits 3 and 5. Mr. Heisler's

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<sup>12</sup> Although there is no bulk terminal at Social Circle, GA, Mr. Heisler would transload rail cars destined to and from TPI's lease track at that location for Lane Nos. 1, 28, 116 (formerly A-1), 117 (formerly A-3), and 118 (formerly A-4). *Heisler V.S.* at 12, and Exhibits 3 and 5. TPI ships rail cars to lease track on the Great Walton Railroad ("GRWR") at Social Circle (Lanes 1 and 28), where they are stored until shipped to TPI's nearby customers (Lanes 116, 117 and 118). *Cast V.S.* at ¶ 45. It makes no sense for TPI to ship rail cars to Doraville and transload them onto trucks to be shipped to Social Circle and reloaded onto rail cars, and then transload the rail cars back onto trucks for delivery to TPI's customers. Moreover, Social Circle does not meet TPI's minimum standards for a transload facility, because it is not paved or gated; and it is not tended and does not have a terminal operator on site. *Id.* at ¶ 46. Mr. Heisler also incorrectly states that TPI could ship from Social Circle to Doraville via the NS. The GRWR is split into two segments, and Social Circle is not on the segment that connects with the NS. *Id.*, Ex. 9. See also TPI Reply Exhibit 6.

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transload rate estimates are flawed. But even accepting these estimates at face value, they do not demonstrate a lack of market dominance.

**a. Mr. Heisler's transload cost evidence is incomplete and inaccurate.**

In the time allotted for TPI to reply to CSXT's Motion, TPI has not been able to perform a lane-by-lane analysis of Mr. Heisler's transload cost evidence. Nor is TPI required to do so by the Board's procedural schedule, which does not require TPI to submit its opening evidence on market dominance until February 16, 2011. Moreover, Mr. Heisler has not provided a sufficiently detailed break-down of the cost components for TPI to verify all of his calculations even if there were sufficient time to do so. Nevertheless, TPI has identified numerous flaws that call into question the accuracy of Mr. Heisler's evidence.

One clearly identifiable flaw is the rail rate that Mr. Heisler used from a gateway to a bulk terminal in the absence of an existing TPI contract rate. Although there are published tariff rates for such lanes, Mr. Heisler has used a so-called "surrogate rate," which is simply a euphemism for "fabricated rate." Heisler V.S. at 4, Heisler Exhibit 1. There is no guarantee that TPI could obtain the rate theorized by Mr. Heisler from any rail carrier. The surrogate rate used by Mr. Heisler is based upon URCS costs and an average R/VC ratio from TPI's rail contracts. Heisler V.S. at 4; Fisher V.S. at 3-6. As CSXT surely knows, such contracts cover dozens if not hundreds of lanes, and may involve give and take on specific lanes. It is not possible to simply add another lane to an existing contract, and expect to obtain an average R/VC ratio for the new lane based on a railroad's variable costs.<sup>13</sup> Moreover, the fact that the surrogate rate is based on

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<sup>13</sup> Cf. Reply Comments of CSX Transportation, Inc. and Norfolk Southern Railway Company, in STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases, at page 26 (filed Nov. 30, 2006) ("Neither rail carriers nor most businesses set prices by reference to a formula; in any industry, businesses set prices based on a multitude of factors that cannot be reduced to a formula or mechanical calculation.").

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URCS costs flies in the face of repeated railroad statements over the past several years that they set their rates based on the market, not costs.

As evidence of the speculative nature of Mr. Heisler's "surrogate" rates, when TPI requested a contract rate from NS via the gateways and to the bulk terminals selected by Mr. Heisler, NS refused to quote a rate on any of those lanes. *Cast V.S.* at ¶ 56, Ex. 10. The rates requested by TPI, and the corresponding case lanes, are:

- Memphis to Doraville TBT from a Houston Origin and a Bruns Origin: Case Lane No. 1.
- Memphis to Chattanooga TBT from a Houston Origin and a Bruns Origin: Case Lane Nos. 10, 53, 74, and 76.

NS informed TPI that its internal NS policy is not to quote rates to bulk terminals that would truck around CSXT-served customers because "that is a battle that NS cannot win." *Cast V.S.* at ¶ 56. Thus, CSXT's so-called "surrogate" rates for NS are completely unrealistic.

For some lanes, Mr. Heisler also has rerouted TPI's traffic through gateways that are not permitted by the origin carrier's routing protocols. For example, he reroutes polystyrene shipments in Lane Nos. 13 (Memphis-Glasgow, KY), 25 (Memphis-Clarksville, TN), and 42 (Effingham-Warminster, PA), via East St. Louis. But, the CN will not honor that interchange. *Id.* at ¶ 57.

Mr. Heisler also has failed to account for any changes to the rate that TPI must pay the origin rail carrier to transport the traffic to a different gateway. In order to account for the impact of the gateway change upon TPI's total costs, Mr. Heisler would need to compare the current through transportation costs with the through costs of his proposed alternate route. Otherwise, he is comparing apples with oranges. Because a gateway change may alter the length

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of haul for each carrier, a rate reduction by one carrier could be more than off-set by a rate increase by the other.

Similarly, Mr. Heisler has failed to consider whether an origin carrier's proportional rates can be used for local movements. For all case lanes in his Exhibit 3, Mr. Heisler does not change the gateway, but he does terminate all of the traffic at a bulk terminal instead of interchanging with CSXT or another rail carrier. In fact, TPI must pay either {{[REDACTED]}} or {{[REDACTED]}} per rail car extra on ten of the lanes in Exhibit 3, if the movement terminates at the gateway on the origin carrier. Cast V.S., Ex. 11.

Although Mr. Heisler purports to have included all costs associated with rail-truck transloads in his analysis, some costs have not been included and others are completely undocumented. The most significant omission by Mr. Heisler is his failure to include rail car storage charges at the bulk terminals. When rail cars are shipped direct to a customer, the customer stores the cars on its own track, or track leased at its expense, until the cars are unloaded. In contrast, transloading would require TPI to pay storage charges to the bulk terminal. Cast V.S. at ¶ 49. Typically, a bulk terminal will grant 10 days of free time, after which there is a daily charge per rail car. *Id.* For example, the NS Thoroughbred terminal tariff provides for a daily storage charge of \$50 from days 11-40 and \$90 thereafter.<sup>14</sup> *Id.*, Exhibit 12. TPI Witness Cast provides the average rail car hold times for each case lane customer in his Exhibit 13. The average hold time by customer ranges from a low of 17 days to a high of 109 days. *Id.* Thus, it is quite evident that Mr. Heisler omitted potentially substantial additional costs associated with transload alternatives.<sup>15</sup>

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<sup>14</sup> Mr. Heisler proposes to reroute 65 lanes in his Exhibit 5 through Thoroughbred terminals.

<sup>15</sup> Mr Heisler also fails to document some of his costs. For example, he states that he "accounted for any facility charges for the proposed transload facilities." Heisler V.S. at 4. In

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TPI has presented ample grounds to challenge the accuracy, completeness, and credibility of CSXT's competitive cost evidence. Clearly, CSXT's evidence is inadequate to carry its burden to raise considerable doubts as to the TPI's ability to demonstrate market dominance.

**b. Tariff rates that are comparable to higher cost rail-truck transload alternatives are evidence of CSXT's market dominance.**

A central contention of CSXT's Motion is that it cannot possess market dominance when its rates are at or above rates for rail-truck transload alternatives. For the sake of argument, even if Mr. Heisler has accurately depicted the rates that TPI could obtain for alternative transportation via a rail-truck transload, this does not establish that alternative as an effective competitive constraint upon CSXT's pricing. In the recent DuPont small rate cases, the Board reaffirmed the long-established principal that comparable pricing among modes does not, by itself, constitute effective competition:

Even if we were to find that the cost of trucking the product is similar to the cost of using rail after the CSXT rate increase, it does not follow that the threat of trucking is evidence of effective competition. After all, even a monopolist finds that there is a profit-maximizing price beyond which it cannot raise prices without adversely affecting its bottom line. A carrier possessing market power might set its rates so high that it would begin to lose business to a higher-cost alternative (such as a trucking company). As the Board has previously noted, while this may create an "outer limit" constraint, it does not necessarily mean that effective competition is present.

E.I. du Pont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099.

(served June 30, 2008) (underline in original) (footnotes omitted). See also, FMC Wyoming

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his Exhibit 3, however, Mr. Heisler does not show any facility costs. In his Exhibit 5, although Mr. Heisler has a column for "Facility Charge," he has not attached any documentation to support the amounts. Furthermore, Mr. Heisler uses a \$400 per rail car "Facility Charge" in Exhibit 5 for all NS Thoroughbred bulk terminals, even though the NS tariff charge would be \$660. The NS TBT tariff charge is \$0.33 per hundred pounds, which at 200,000 pounds per rail car equals \$660. *Cast V.S.*, Ex. 12.

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Corp. v. Union Pac. R.R. Co., 4 STB 699, 718 (2000) (“the fact that [carrier] matches prices set by alternatives with significantly higher costs, while maintaining a dominant market share, is not enough to demonstrate effective competition for the traffic at issue”); Ariz. Pub. Serv. Co. v. U.S., 742 F.2d 644, 650-51 (D.C. Cir. 1984) (a competitive constraint does not equate to effective competition). Consequently, the fact that transload rates are comparable to CSXT’s rates merely demonstrates that CSXT has priced up to its nearest, higher cost competitive constraint, not that such constraint constitutes effective competition.

Neither CSXT nor Mr. Heisler contend that rail and rail-truck transloads have similar cost structures. To do so would defy logic. All but one of the Issue Movements are joint movements involving at least two rail carriers. All of the Issue Movements in Heisler Exhibit 5 also are at least two rail carrier movements; but they incur additional bulk terminal and motor carrier costs that are not incurred by the current direct-rail service. Therefore, the significantly higher cost structure of a rail-truck transload alternative is self-evident. CSXT’s decision to set its rates at or near this higher cost alternative, while continuing to maintain a dominant market share in actuality demonstrates a lack of effective competition.

Among the many factors that constitute evidence of market dominance, the Board has included “the absence of any diversion after a reasonable time following a rate increase.” Special Procedures, 353 ICC at 929. A very important fact that must not be overlooked is that CSXT took its most significant rate increases in 2007, when TPI’s contract rates increased by a volume weighted average of 38%. See Cast V.S. at ¶ 59, Ex. 1. Since then, CSXT has continued to take sizeable, but smaller, rate increases annually, including throughout the recent recession when motor carriers were reducing their rates. Id. at ¶ 59. This is not a case where the tariff rates represent the first significant rate increase and there may not have been sufficient time

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to determine if traffic will be diverted to other alternatives. CSXT imposed its first significant rate increases 3 years ago, and has continued to increase rates every year since without a loss of traffic. TPI's inability to divert traffic from CSXT to alternative modes despite a protracted period of CSXT rate increases, even during a lengthy and severe economic recession, is compelling evidence of CSXT's market dominance.

Furthermore, the R/VC ratios generated by all but one of the challenged rates are well above 300%, and reach as high as 1158%, despite the transload alternatives identified by CSXT. See Complaint Exhibits A and B. Although evidence that rail revenues substantially exceed variable costs by itself does not indicate market dominance, when such data is supported by other evidence, as is the case in this proceeding, it "may serve to buttress a finding that the existing level of competition may not be effective to constrain rail rates to a reasonable level." E.I. du Pont de Nemours and Company v. CSX Transp., Inc., STB Docket No. 42101, slip op. at 5 (served June 30, 2008), citing McCarty Farms v. Burlington Northern Inc., 3 I.C.C. 2d 822, 832 (1987).

**5. Customer requirements constrain TPI's ability to use alternatives to CSXT's rail transportation.**

Even where there might be sufficient terminal and truck capacity at competitive rates to handle the volumes shipped by TPI, there are a multitude of other factors that can and do significantly restrict TPI's ability to use rail. The ICC stated, in Special Procedures, 353 ICC at 929, that:

If a market is to be truly competitive, shippers must be able to respond quickly to changes in transportation charges. They must be in a position to shift their demand from one rail carrier to other rail carriers or carriers of other modes. Such a shift in demand requires not only the availability of carriers ready to provide a comparable service, but also the ability of shippers to take advantage of that service.

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TPI is constrained in its ability to use alternative modes by the demands of its customers, which have the option of purchasing product from TPI's competitors if TPI cannot accommodate their needs.

The most common limitation upon the use of trucks to transport the issue commodities is the customer's lack of storage capacity at its facility. Customers routinely use TPI's private rail cars for storage, because they have little or no storage capacity at their facilities. Cast V.S. at ¶ 36. TPI's customers in the following case lanes require rail cars because they do not have any storage silos: Lane Nos. 13, 69, 94, and 100. Id. at ¶ 17.

In addition to selling its product to end-user customers without sufficient storage, TPI also sells to brokers, who are middle-men that purchase rail cars of product that they then resell to end-user customers. Cast V.S. at ¶ 8 and 36. TPI has described this scenario in greater detail in Part III.B., above. These brokers require rail car deliveries to bulk terminals of their choosing, where the commodity is stored in the rail car until resold. Id. at ¶ 36 and 48. Some end-user customers also require rail deliveries to designated bulk terminals. Id. at ¶ 16. TPI's customers in the following case lanes are brokers that resell TPI's product out of railcars at bulk terminals or end-users that require TPI to deliver product to a specified bulk terminal: Lane Nos. 2, 19, 38, 55, 70, 97, 98, 104, 109, 110, 112, and 114. Id.

Another limitation upon the use of trucks arises with consignment sales. TPI sells large volumes of its product on consignment, which means that the customer does not pay for, or possess title to, the product until it unloads the product into its facilities. Truck shipments cannot be sold on consignment because trucks must be unloaded immediately upon delivery, whereas TPI's private rail cars can be used for storage until the customer uses the commodity. Id. at ¶ 13.

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TPI's customers in the following case lanes purchase product from TPI on consignment: Lane Nos. {{ [REDACTED] }} Id.

Even customers that have adequate storage at their facilities require rail cars when purchasing "off-grade" product from TPI. Off-grade product is sold at a discount, because it is not pure due to production problems or contamination, to customers which do not require specification grade product in their end use. Cast V.S. at ¶ 11. Those customers, however, cannot store off-grade product in storage silos that normally store specification-grade product because the off-grade product would contaminate the specification grade product. Id. at ¶ 12. Therefore, unless they can use the product immediately upon delivery, off-grade customers require rail delivery so that they can use the rail cars for storage. Id. TPI's customers in the following case lanes purchase off-grade product: Lane Nos. {{ [REDACTED] }} Id.

Shipments to third-party processors and compounders typically require delivery in rail cars. A third-party processor is an entity hired by TPI's customer to process the product on behalf of the customer. Id. at ¶ 10. The customer orders the product from TPI and directs TPI to deliver the product to the facility of the third-party processor. Id. at ¶ 9. Because the third-party processor processes product of many different grades from different producers for many different customers, it cannot store the product except in rail cars. Id. at ¶ 10. Similarly, compounders are brokers that modify TPI's product before resale, such as by adding pigment. Id. at ¶ 8. They require rail cars for the same reasons as third-party processors. Id. at ¶ 10. The following case lanes involve delivery of TPI's product to a third party processor or compounder: Lane Nos. 2, 34, 38, 52, 61, 83, 102, 104, 108, and 115. Id.

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Customers that use TPI's product in medical grade applications prefer delivery by rail in order to minimize contamination risks. Id. at ¶ 14. TPI's customers in the following case lanes produce medical grade applications: Lane Nos. 23, 51, 62, 69, and 100. Id. None of these customers has received a single truck shipment from TPI since 2006, except for {{█}} trucks received in Lane 69. Id., Ex. 4.

Finally, TPI may be constrained in its options simply by the fact that its sales contract with the customer requires rail delivery. A contractual requirement to deliver product "by rail makes a switch to trucks highly infeasible from an economic standpoint due to the risk of losing [the] customer or incurring breach-of-contract liability." E.I. du Pont de Nemours and Company v. CSX Transp., Inc., STB Docket No. 42101, slip op. at 6 (served June 30, 2008). TPI's contracts with customers in the following case lanes require delivery by rail: Lane Nos. {{█  
█.}}<sup>16</sup> Cast V.S. at ¶ 15. Although TPI's contracts with customers in the following case lanes permit truck delivery, the customer must pay a premium for truck delivery above the price paid if the product is delivered in rail cars: Lane Nos. {{█  
█}}. Id.

**IV. CSXT WRONGLY SEEKS TO DISMISS TPI'S RATE CHALLENGES AS "PAPER RATES."**

In addition to its market dominance arguments, CSXT asks the Board to dismiss TPI's Complaint outright with respect to eight lanes because "TPI is not moving traffic" under the respective rates, and the Board does "not have jurisdiction to consider...the reasonableness of paper rates that have not been used to move traffic." CSXT Motion at 22. The eight lanes identified by CSXT from TPI's First Amended Complaint are A-2, 37, 69, 88, 89, 90, 91, and 99.

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<sup>16</sup> Although most of these contracts do not explicitly state that rail is required, this fact is evident in contract terms that only provide prices for rail cars, and in some cases, require TPI to maintain lease tracks for rail cars.

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CSXT Motion at 23; Karn V.S. at 2. Because TPI has removed Lanes 88 and 90 in TPI's Second Amended Complaint, filed on October 4, 2010, the Board needs only to consider CSXT's argument as to the remaining six lanes. The Board should not dismiss TPI's Complaint against these six lanes either as a matter of fact or law.

**A. CSXT Statement of the Law is Incorrect.**

**1. The precedent cited by CSXT is inapposite.**

In support of its Motion, CSXT makes the unprecedented assertion that the phrase, "a rate charged or collected by a rail carrier," in 49 U.S.C. 10704(a)(1), means that a shipper may not challenge a rate that it has never used before. Motion at 23. But even the case law that CSXT cites does not support that interpretation. Moreover, CSXT's interpretation of the statute is directly contrary to the very precedent that it does cite.

First, CSXT relies upon a misleading quotation from West Texas Utilities Company v. Burlington Northern Railroad Company, ICC Docket No. 41191, 1994 ICC Lexis 190 (served Oct. 14, 1994). CSXT's selective quotation on page 23 of its Motion conveniently ignores the context provided by the full sentence, which is:

In enacting section 229, Congress of course recognized that shippers had no basis on which to challenge rates for service they had never used, and so it also set up the so-called "paper rate exception."

1994 ICC Lexis at \*4 (underlined text omitted from CSXT's quote). This quotation concerns the "paper rate exception" applicable to section 229 of the Staggers Act. Section 229, which no longer exists, "set up a window in which shippers were required to challenge existing rates...[and] provided that rates in effect on the date of the passage of the Staggers Act, if not successfully challenged within 180 days, would become immune from challenge thereafter and would be deemed reasonable." Arizona Public Service Company and PacifiCorp v. The

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Atchison, Topeka and Santa Fe Railway Company, ICC Docket No. 41185, 1995 ICC Lexis 54 at \*2 (served March 17, 1995).

A rate that was in effect at the time of the Staggers Act, but under which little or no traffic moved, was considered a “paper rate.” Metropolitan Edison Company v. Conrail, et al., 5 I.C.C. 2d 385, 387 (1989). Under the paper rate exception, such a rate still could be challenged under section 229, even after expiration of the 180-day window, if traffic increased at least tenfold. Id. Thus, the “paper rate exception” gave additional section 229 rate challenge rights to shippers; it did not eliminate the general ability of shippers to challenge any subsequent rates under which little or no traffic moved, as CSXT contends. In sum, CSXT’s faulty reliance on the WTU decision should be rejected by the Board.

CSXT also misrepresents older ICC precedent on this issue. Motion at 23. All three cases cited by CSXT actually support the proposition that a rate challenge is proper (and agency jurisdiction exists) where there is evidence that future shipments will occur. In Federal Chemical Company v. Baltimore & Ohio Railroad Company, et al., 210 ICC 577, 578 (1935), the ICC refused to prescribe a rate for an “inadvertently specified” route where there is “no evidence” the route will be used in the future. In Capital City Monument Works et al. v. Baltimore & Ohio Railroad Company, et al., 161 ICC 13, 18 (1930), the ICC refused to establish a rate for granite to Berkeley Springs, West Virginia because “no dealer of granite is located” there and because there is “no prospect” of future movements. In South Georgia Traffic Bureau v. Florida East Coast Railway Company, et al., 153 ICC 725, 726 (1929), the ICC stated that there is “no necessity” for establishing rates for the future when the complainant apparently has offered no evidence of past or future shipments. As discussed below, none of the situations in the case law cited by CSXT apply to the rates that are the subject of TPI’s Complaint.

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2. **The Board may exercise jurisdiction over rates even when little or no past traffic has moved under those rates.**

CSXT's assertion that the Board does not have jurisdiction over so-called "paper rates" ignores a large body of cases where the Board has exercised jurisdiction when no traffic has yet moved under a challenged rate. In Nebraska State Railway Commission v. Alexandria & Western Railway Company et al., 113 ICC 467, 469 (1926), the ICC unequivocally declared that "a complainant may rightfully assail, and we may properly condemn, unreasonable or otherwise unlawful rates regardless of their present use."

This principal underlies several recent rate case decisions. See, e.g., Kansas City Power & Light v. Union Pacific Railroad Company, STB Docket No. 42095, slip op. at 2-3 (served May 19, 2008) (complaint filed Oct. 12, 2005, but rate not effective until Jan. 1, 2006). Cf. Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, Ex Parte No. 638, slip op. at 3 (n. 5) (served April 3, 2003) (Board hints that it may have authority to order a railroad to set a tariff rate five months prior to a contract's expiration). See also Northeast Kentucky Coal Bureau v. Chesapeake & Ohio Railway Company, 201 ICC 165, 167 (1934) ("Although the rate sought could not be used immediately, because of the necessity for building the [coal] tipple and otherwise preparing for the transshipments, complainant is entitled to a decision on the merits of the case.").

In another recent large rate case decision, the Board noted that no traffic had moved from two mine origins prior to the development of the record; thus, there was not sufficient data to determine the variable costs. Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 10 (served March 24, 2003) ("TMPA"). The Board said that, if traffic moved from either of these origins in the future, the parties should use the procedures set forth in the decision "to calculate the variable costs

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associated with serving these mines so as to determine whether that service is subject to our rate regulation and our rate prescription.” *Id.* at 10. This statement indicates that the other mine origins were covered by the Board’s TMPA decision, despite the absence of any current movements from those mines or any certainty of future movements.

CSXT’s position on the issue of “paper rates” also should be rejected because it would completely eliminate rail rate regulation for captive carload shippers such as TPI. A railroad facing a rate complaint from a carload shipper with hundreds of constantly changing customers, such as TPI, could simply set its tariff rate at a very high level, knowing that no traffic could move at that rate for the relevant lanes. Under CSXT’s view, this lack of traffic means no Board jurisdiction would exist and the tariff rate would effectively be immune from regulation. In other words, under CSXT’s interpretation of Board jurisdiction, the higher (and more unreasonable) the tariff rate, the less likely that Board jurisdiction exists.<sup>17</sup>

The ICC long ago recognized this potential abuse and rejected CSXT’s position. In United Verde Extension Mining Company v. United Verde & Pacific Railway Company, Director General, as Agent, et al., 66 ICC 377, 379 (1922), the ICC concluded that “an excessive rate can not be justified merely on account of the fact that movements thereunder are infrequent [because] [t]he maintenance of a rate that is too high may be one of the causes of which a light movement is the effect.” Similarly, in Apache Powder Company v. Atchison, Topeka & Santa Fe Railway Company et al., 115 ICC 339, 340 (1926), the ICC held that the complainant was entitled to a reasonable rate, even though there was no prospect for sawdust shipments at the time of the hearing because the entire current production was consumed locally. The ICC

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<sup>17</sup> This interpretation represents a gross distortion and manipulation of the Board’s procedures, and should be rejected. *Cf. Special Procedures*, 353 ICC at 929 (“It is difficult to imagine why the railroads would increase a rate which does not move traffic.”).

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concluded that establishment of a reasonable rate now was necessary to enable complainant to secure sawdust from the origin whenever available, because a movement might not otherwise be possible under excessive rates. Similarly, TPI requires reasonable rates in order to secure new business.

Under CSXT's view, TPI is stuck in precisely this "Catch-22" situation: traffic may not move due to the high tariff rates, but the high rates are not under Board jurisdiction because no traffic has moved. If the Board's regulatory authority is to have any meaning whatsoever for carload shippers like TPI, with hundreds of constantly changing origin-destination lanes, then the Board must not adopt CSXT's position. Otherwise, captive carload shippers will suffer with unconstrained rates, and the promise of 49 USC § 10101(6) will be limited to coal shippers only. Such a result is contrary to the intent of Congress. Cf. Market Dominance Determinations – Product and Geographic Competition, 3 STB 937, 944 (1998) ("We are concerned...that captive shippers have real (and not merely theoretical) access to the Board for legitimate complaints.").

**B. CSXT Incorrectly Alleges That Traffic Has Not Moved.**

Unlike the cases cited by CSXT, Lanes A-2, 37, 69, 89, 91, and 99 all terminate at businesses that are past, present, or potential purchasers of TPI's products. For each of these lanes, there is "evidence" of past shipments and/or a "prospect" of future shipments.

**1. Lane A-2: Clinton, IN-Atherton, IN**

Contrary to CSXT's assertions, TPI has tendered {█} cars on this lane since the tariff rates became applicable on July 1, 2010. See Cast V.S. at ¶ 64. CSXT's mistaken assertion may be attributable to confusion about the origin of this movement. TPI identified the origin as Crawfordsville, IN, in the original Complaint, but then revised the origin to Clinton in the Second Amended Complaint. The origin is track that TPI leases from CSXT, and the lease

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identifies the track location as Crawfordsville, although the origin station is Clinton. With this clarification, Lane A-2 clearly does not pose the “paper rate” issue raised by CSXT.

**2. Lane 37: New Orleans-Simpsonville, SC**

Lane 37 involves the transportation of polypropylene to a new TPI customer, { [REDACTED] }. TPI received its first purchase order from the customer { [REDACTED] }. Cast V.S. at ¶ 65, Ex. 14. Because shipments are imminent, Lane 37 does not pose the “paper rate” issue raised by CSXT.

**3. Lane 69: Memphis-Gallaway, TN**

{ [REDACTED] } is a past customer of TPI at Gallaway, and TPI hopes to secure that business once again. Cast V.S. at ¶ 66. A reasonable rail rate is an important factor in TPI’s ability to do so, because { [REDACTED] }. *Id.* Therefore, all product must be delivered by rail.

**4. Lane 89: Memphis-Horse Cave, KY**

Lane 89 was incorrectly identified in the original Complaint. As corrected in the Second Amended Complaint, the origin is Memphis and the commodity is polystyrene. While there has been no traffic since the tariff rate became applicable on July 1, 2010, this lane should remain in the case. The customer, { [REDACTED] }, normally obtains polystyrene from its own facility { [REDACTED] }. However, the customer relies upon TPI for polystyrene whenever there is a problem with supply from its { [REDACTED] } plant. Cast V.S. at ¶ 67, Ex. 15.

**5. Lane 91: New Orleans-Matthews, NC**

In the Second Amended Complaint, the commodity for this lane was corrected to Polyethylene. { [REDACTED] } is a past customer of TPI at Matthews, NC, { [REDACTED] }

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{REDACTED}. Cast V.S. at ¶ 68. With this documented possibility of future traffic, the Board has jurisdiction over the tariff rate.

**5. Lane 99: Effingham, IL-Mamaroneck, NY**

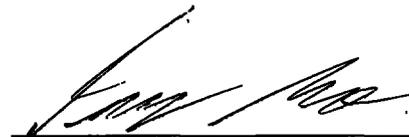
Lane 99 is a movement of Polystyrene to Mamaroneck, New York. Although Mr. Karn states that there has been no traffic on this lane since January 1, 2009, Karn V.S. at 2, TPI in fact shipped {REDACTED}. Cast V.S. at ¶ 69. Moreover, even CSXT's citation to WTU would not bar TPI's challenge of this rate. Quoting from WTU, CSXT states that "Congress of course recognized that shippers had no basis on which to challenge rates for service they had never used." Motion at 23 (underline added). The emphasis is placed on whether the service has been used, not the rates. TPI clearly has used the service within the past year, albeit pursuant to a contract in effect at the time. Given these facts, this lane should remain in the case.

**V. CONCLUSION.**

CSXT's Motion is both procedurally improper and fundamentally unfair to TPI, and should be denied on that basis alone. Moreover, CSXT has not raised "considerable doubts" as to TPI's ability to demonstrate market dominance, which is an established prerequisite for bifurcating the presentation of market dominance evidence from rate reasonableness evidence. Indeed, TPI has presented compelling evidence that there is a lack of effective competition to CSXT's rail service over the case lanes, and thus that CSXT does possess market dominance. Finally, CSXT has misstated both the law and facts regarding challenges to "paper rates," and thus that portion of CSXT's Motion also should be denied.

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Respectfully submitted,



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Jeffrey O. Moreno  
David E. Benz  
Thompson Hine LLP  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800

October 21, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that this 21st day of October 2010, I served a copy of the foregoing upon Defendants in the following manner and at the addresses below:

**Via hand-delivery to:**

G. Paul Moates  
Sidley Austin LLP  
1501 K Street, NW  
Washington, D.C. 20005  
*Counsel for CSXT*

**Via first class mail to:<sup>18</sup>**

Lamont Jones, General Manager Carolina Piedmont Division 268 E. Main Street Laurens, SC 29360	Cathy S. Hale, Chief Executive Officer Madison Railroad City of Madison Port Authority 1121 W. JPG Woodfill Road #216 Madison, IN 47250
Jeff Collins, General Manager Mohawk, Adirondack & Northern Railroad Corp. 1 Mill Street, Suite 101 Batavia, NY 14020	William J. Drunsic, President Nashville and Eastern Railroad Corp. 514 Knoxville Avenue Lebanon, TN 37087
Bernard M. Reagan, Senior Vice President Seminole Gulf Railway L.P. 900 W.C. Owens Avenue Clewiston, FL 33440	Lucinda K. Butler, Director South Branch Valley Railroad 120 Water Plant Drive Moorefield, WV 26836
G.R. Abernathy, President Sequatchie Valley Railroad Company 120 Soulard Square Bridgeport, AL 35740	Paul G. Nichini, President New Hope & Ivyland Railroad 32 West Bridge Street New Hope, PA 18938

<sup>18</sup> Because the recipients by first class mail have not signed the Undertakings required by the Protective Order in this proceeding, they have only been served with the Public Version of this filing.

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<p>Joe Martin, Division Manager R.J. Corman Railroad Company (Memphis) P.O. Box 337 145 East 1st Street Guthrie, KY 42234</p>	<p>Michael L. Rennieke, General Manager Pioneer Valley Railroad 100 Springdale Road Westfield, MA 01085</p>
<p>Thomas Burden, General Manager Georgia Woodlands Railroad, LLC 210 Depot Street P.O. Box 549 Washington, GA 30673</p>	

  
\_\_\_\_\_  
Jeffrey O. Moreno

# TPI Exhibit 1

September 20, 2010

*By E-Mail and First Class Mail*

Paul Hemmersbaugh  
Sidley Austin LLP  
1501 K Street, NW  
Washington, DC 20005

**RE: TOTAL Petrochemicals USA, Inc. v. CSX Transportation, Inc., STB Docket No. 42121**

Dear Paul:

I am writing in response to your September 10, 2010 correspondence requesting clarification of TOTAL Petrochemical USA, Inc.'s ("TPI") Complaint with respect to twenty-two (22) movements involving both CSX Transportation, Inc. ("CSXT") and another rail carrier. Specifically, you have identified two potentially applicable tariff rates for each of the 22 movements. The "Option A" rates cover both CSXT's portion of the line-haul transportation and the delivering short line railroad's portion. The "Option B" rates cover just CSXT's portion. You have asked TPI to clarify whether it is challenging the Option A or the Option B rate for each movement. Furthermore, if TPI is challenging the Option A rate, you have asked whether and when TPI intends to amend its Complaint to join the participating short lines as co-defendants.

As noted in our exchange of letters and e-mails last week, TPI is not in a position to fully respond to your letter until CSXT has produced any and all agreements pertaining to CSXT payments of a revenue factor, division, flat rate or other compensation ("Agreements")<sup>1</sup> to short line railroads. Those agreements are needed for TPI to determine whether the short line railroads are line-haul carriers. The information that CSXT has provided in response to my September 13, 2010 letter is not sufficient to make that assessment.

Based upon the information that is presently available to it, TPI provides the following clarifications in response to your September 10th letter:

Lane #	Origin	Destination	Shortline	TPI Action
1	Memphis, TN	Social Circle, GA	GRWR	TPI is challenging the Option B rate.
8	New Orleans, LA	Washington, GA	GWRC	Undetermined
10	Memphis, TN	Old Hickory, TN	NERR	Undetermined
12	New Orleans, LA	Sarasota, FL	SGLR	Undetermined

<sup>1</sup> Agreements may include, for example, any freight operating agreements, rail line purchase or lease agreements or interline settlement agreements.

Jeff.Moreno@ThompsonHine.com Phone 202.263.4107 Fax 202.331.8330

226575.3

THOMPSON HINE LLP  
ATTORNEYS AT LAW

1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036-1600

www.ThompsonHine.com  
Phone 202.331.8800  
Fax 202.331.8330

September 20, 2010

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24	Effingham, IL	Lakeville, NY	LAL	TPI will remove this lane from the Complaint.
25	Memphis, TN	Clarksville, TN	RJCM	Undetermined
28	New Orleans, LA	Social Circle, GA	GRWR	TPI is challenging the Option B rate.
34	Chicago, IL	Utica, NY	MHWA	Undetermined
37	New Orleans, LA	Simpsonville, NC	CPDR	Undetermined
40	New Orleans, LA	River Terminal, NC	AR	TPI will remove this lane from the Complaint.
41	East St. Louis, IL	Shelbyville, KY	RJCC	TPI will remove this lane from the Complaint.
42	Effingham, IL	Warminster, PA	NHRR	TPI will remove this lane from the Complaint.
47	New Orleans, LA	Panama City, FL	BAYL	TPI will remove this lane from the Complaint.
52	Memphis, TN	Jasper, TN	SQVR	Undetermined
61	Chicago, IL	Utica, NY	MHWA	Undetermined
66	New Orleans, LA	Wareboro, GA	SMW	Undetermined
74	Memphis, TN	Lebanon, TN	NERR	Undetermined
80	New Orleans, LA	Petersburg, WV	SBVR	Undetermined
92	Chicago, IL	Farmingdale, NY	NYA	TPI will remove this lane from the Complaint.
93	Chicago, IL	North Vernon, IN	CMPA	Undetermined
95	New Orleans, LA	Valdosta, GA	VR	TPI will remove this lane from the Complaint.
114	Chicago, IL	Westfield, MA	PVRR	Undetermined

For all lanes in the above chart where TPI's action is listed as "Undetermined," TPI awaits CSXT's production of its Agreements with the short line railroads. TPI will file an amended complaint with the above modifications, and any other modifications that may be warranted by CSXT's Agreements with the short line railroads, once TPI has received and reviewed those Agreements.

Sincerely,



Jeffrey O. Moreno

# TPI Exhibit 2

**"Highly Confidential  
Exhibit Redacted"**

# TPI Exhibit 3

**"Confidential Exhibit Redacted"**

# TPI Exhibit 4

**"Highly Confidential  
Exhibit Redacted"**

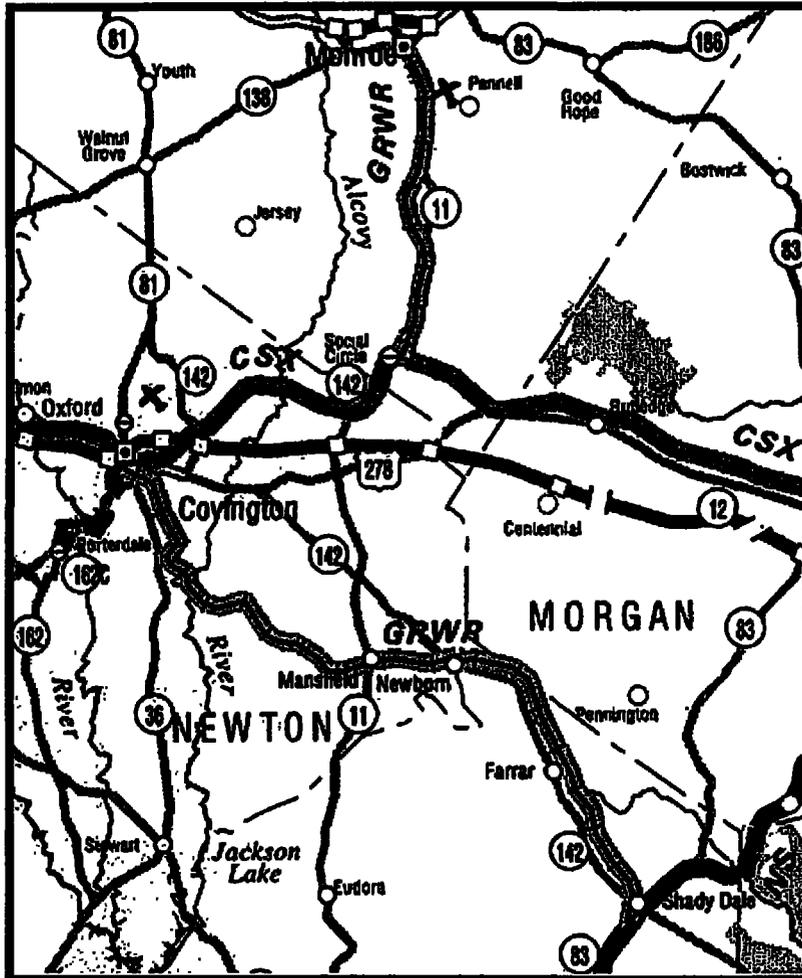
# TPI Exhibit 5

**"Highly Confidential  
Exhibit Redacted"**

# TPI Exhibit 6



# Great Walton Railroad



From Georgia Railroads Map, May 2000, by Georgia Department of Transportation, Office of Intermodal Programs and Information Services.

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Georgia's Railroad History & Heritage. Copyright, Steve Storey.

[Railroad History](#) | [The Depot List](#) | [Locomotives On Display](#) | [Odds & Ends](#) | [Sources & References](#) | [Home](#)

**Cast V.S.**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**TOTAL PETROCHEMICALS USA, INC.** )

**Complainant,** )

**v.** )

**Docket No. NOR-42121**

**CSX TRANSPORTATION, INC; CAROLINA )  
PIEDMONT DIVISION; GEORGIA )  
WOODLANDS RAILROAD, LLC; )  
MADISON RAILROAD; MOHAWK, )  
ADIRONDACK & NORTHERN RAILROAD )  
CORP.; NASHVILLE AND EASTERN )  
RAILROAD CORP.; NEW HOPE & )  
IVYLAND RAILROAD; PIONEER VALLEY )  
RAILROAD; R.J. CORMAN RAILROAD )  
COMPANY (MEMPHIS); SEMINOLE )  
GULF RAILWAY L.P.; SEQUATCHIE )  
VALLEY RAILROAD COMPANY; AND )  
SOUTH BRANCH VALLEY RAILROAD )**

**Defendants.** )

---

**VERIFIED STATEMENT OF ALLEN CAST**

1. My name is Allen Cast. I am the Manager – T & D Sourcing & Strategy at TOTAL PETROCHEMICALS USA, INC. (“TPI”), TOTAL Plaza, 1201 Louisiana Street, Suite 1800, Houston, Texas 77002. TPI is headquartered in Houston and produces polymers, base chemicals, transportation fuels, and other products. TPI is the American entity of Belgium-based Total Petrochemicals, which itself is part of Total SA, the world’s fourth largest integrated petroleum company.

2. As a fully integrated operation, TPI’s production includes base petrochemicals from steamcrackers and certain refinery processing plants – olefins (ethylene and propylene), C4

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fractions, and aromatics (benzene, toluene, xylene, and styrene) – as well as the commodity polymers they produce (polyethylene, polypropylene, polystyrene, and elastomers). TPI has manufacturing facilities in Texas and Louisiana, a research and development facility in La Porte, Texas and a refinery in Port Arthur, Texas. As described in more detail below, TPI's products are used in a wide range of consumer, industrial, and medical applications.

3. In my role as the Manager – T & D Sourcing & Strategy for TPI, I am responsible for the negotiation of all rail, trucking, warehousing, terminal, and packaging rates and fees, plus the negotiation of all marine container shipments. In my time at TPI, I have supervised various studies on distribution optimization for specific situations, as well as the entire TPI network.

4. I have worked for TPI since June of 2007, when I was hired as the Category Manager, Class I Railroads, a position I held until July 2008 when I became the Manager – T & D Sourcing & Strategy. Prior to working for TPI, I have been employed by other large industrial companies in the logistics and/or sales field. The majority of my 20-plus years of experience has been in the petroleum and chemical industry. I have a B.S. degree in Chemical Engineering from the University of Houston, and I am a member of the National Industrial Transportation League, North American Rail Shippers, and National Freight Transportation Association.

5. I am submitting this Verified Statement (“V.S.”) in support of TPI's Reply in Opposition to the Motion for Expedited Determination of Jurisdiction Over Challenged Rates (“Motion”) which was filed by CSX Transportation, Inc. (“CSXT”) on October 1, 2010 in this proceeding. The purpose of this V.S. is to (1) provide a brief overview of TPI's production facilities and the commodities relevant to this case; (2) describe TPI's distribution network, including the transportation of commodities to TPI's customers; and (3) respond to some of the assertions made by CSXT and its witnesses in the CSXT Motion.

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**I. Overview of TPI's Distribution Network and Customers**

6. In this proceeding, TPI is challenging the CSXT rates for rail transportation of five basic products: polypropylene, polyethylene<sup>1</sup>, polystyrene, aromatics, and styrene. The first three can be described as "polymers" and are, generally speaking, plastic pellets, while the last two are hazardous liquids. However, this is an oversimplification. The great variety of end uses to which TPI's products are put means that TPI's customers require adherence to very detailed specifications, especially for polypropylene, polyethylene, and polystyrene.

7. TPI currently has { ■■■ } active grades of polypropylene, { ■■■ } active grades of polyethylene, { ■■■ } active grades of polystyrene, { ■■■ } active grades of aromatics, and { ■■■ } active grades of styrene.<sup>2</sup> For the vast majority of TPI's customers, substitution of one grade of product for another is not possible without recalibrating and/or retooling the customers' production facilities. When a TPI customer orders a specific grade of product, TPI must manufacture and send a product that matches the customer's specifications; if not, the product will be returned at TPI's expense.

8. TPI's customers include more than just end-users of TPI's products. TPI also sells to brokers and compounders. Brokers usually sell to end-users that buy in small quantities and/or do not meet TPI's credit standards. The broker purchases the product from TPI in large quantities and resells it to the end-user. The broker may instruct TPI to ship the product directly to the end-user, without ever touching the product itself; the broker may be a compounder which modifies the product (e.g., adds pigment) before reselling it to an end-user; or the broker may direct TPI to deliver the product to a bulk terminal from which the broker re-sells the product in

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<sup>1</sup> This is also known as polyethylene HD, with "HD" signifying high density. All of TPI's polyethylene is of the high density variety; therefore, any reference to polyethylene is synonymous with polyethylene HD.

<sup>2</sup> There are sometimes sub-grades or sub-specifications within these grades.

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smaller truckload quantities. These arrangements allow TPI to obtain additional sales that would not be possible otherwise. TPI often does not know the identity of the end-user when products are purchased by brokers or compounders. When TPI sells to a broker or a compounder, it is the broker or compounder (and not the end-user) that is TPI's customer.

9. Processors, as the name implies, engage in further processing and/or blending of TPI's products before the product reaches the end-user. A third-party processor is an entity hired by TPI's customer to process the product on behalf of the customer. The customer orders the product from TPI and directs TPI to deliver the product to the facility of the third-party processor.

10. Shipments to third-party processors and compounders typically require delivery in rail cars. Because they process product of many different grades from different producers for many different customers, they cannot store the product except in rail cars. The rare exception is if they are able to process the product immediately upon delivery by truck. However, if a customer has more than a single truckload of product, all of the trucks must deliver their lading at the same time, which is difficult to coordinate when multiple rail car volumes are involved because each rail car requires four trucks. The following case lanes involve delivery of TPI's product to a third party processor or compounder: Lane Nos. 2, 34, 38, 52, 61, 83, 102, 104, 108, and 115.

11. Some of TPI's customers utilize off-grade polymer products. "Off-grade" signifies that the product does not meet the strict specifications of any particular polymer grade; instead, the product has a wide specification range within the same lot, or the product has been contaminated in some way. Each batch of off-grade product is different, and off-grade products are sold at a discount compared to normal grade products. The off-grade market is very price-

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driven. Off-grade sales occur whenever TPI produces product that fails to meet specifications of a particular grade, or whenever product is contaminated.

12. Customers who order off-grade product generally want to receive all of a particular batch at the same time because they must recalibrate their facilities for each unique batch. Virtually all sales of off-grade product occur in railcars because TPI does not store off-grade product or even intend to produce it. Even customers that have adequate storage at their facilities require rail cars when purchasing off-grade product from TPI; these customers cannot store off-grade product in storage silos that normally store specification-grade product because the off-grade product would contaminate the specification grade product. Therefore, unless they can use the product immediately upon delivery, off-grade customers require rail delivery so that they can use the rail cars for storage. TPI's customers in the following case lanes purchase off-grade product: Lane Nos. {{ [REDACTED] }}

13. TPI also engages in consignment sales, which means that TPI owns the product, and does not receive payment from the customer, until the customer "taps" the rail car containing the product (i.e., the customer begins unloading). Thus, rail transportation is completed and the railcar is sitting at the customer's facility before the sale to the customer occurs. When a customer buys on consignment, the transportation must be by railcar because, unlike privately-owned rail cars, trucks cannot be used for storage. Certain customers would not purchase from TPI without the opportunity to buy on consignment, because a consignment sale means that the customer has extra time to pay TPI for the product. Thus, consignment sales enable TPI to garner additional business. Unlike a normal shipment, where TPI invoices the customer as soon as the shipment leaves TPI's control at the production facility or a local SIT yard, TPI does not invoice the customer in a consignment sale until the railcar is tapped. TPI's customers in the

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following case lanes purchase product from TPI on consignment: Lane Nos. {{ [REDACTED] [REDACTED] }}.

14. Customers that use TPI's products in medical grade applications prefer delivery by rail in order to minimize contamination risks. TPI's customers in the following case lanes produce medical grade applications: Lane Nos. 23, 51, 62, 69, and 100. None of these customers has received a single truck shipment from TPI since 2006, except for {{ [REDACTED] }} trucks received in Lane 69. See attached Exhibit 4.

15. TPI's contracts with customers in the following case lanes require delivery by rail: Lane Nos. {{ [REDACTED] }}. Although most of these contracts do not explicitly state that rail is required, this fact is evident in contract terms that only provide prices for rail cars, and in some cases, require TPI to maintain lease tracks for rail cars. Additionally, some TPI contracts permit truck delivery, but the customer must pay a premium for truck delivery above the rail transportation price that would otherwise apply. This is true for Lane Nos. {{ [REDACTED] }}.

16. Some end-user customers require rail deliveries to designated bulk terminals. TPI's customers in the following case lanes are brokers that resell TPI's product out of railcars at bulk terminals or end-users that require TPI to deliver product to a specified bulk terminal: Lane Nos. 2, 19, 38, 55, 70, 97, 98, 104, 109, 110, 112, and 114.

17. TPI's customers in the following case lanes require rail cars because they do not have any silo storage space: Lane Nos. 13, 69, 94, and 100. This list does not include customers that have silos, but not enough to store the large volumes that they purchase from TPI, such as {{ [REDACTED] }} in Lane 54.

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**II. TPI Facilities Implicated in the CSXT Motion**

18. I understand that CSXT asserts there is or may be effective competition to CSXT rail service for many of the lanes covered by the TPI complaint in this proceeding. These lanes concern transportation of the three polymer commodities, and, therefore, I will focus my Verified Statement on the production, sale, and transportation of those commodities. I will not address styrene or aromatics except in passing.

19. As I will describe in more detail below, all product is loaded directly into railcars upon production or blending at TPI's three polymer facilities. There is no direct loading to trucks because the silos at all three polymer facilities are sized in units of railcar capacity for quality control purposes, and the polymer industry generally engages in quality control via, and customers often order product in, lots that are railcar sized. Therefore, regardless whether the end-user takes delivery of TPI's polymer products by rail or by truck, the first stage in the transportation network is always by rail.

20. TPI produces polypropylene at its La Porte, Texas, facility. La Porte is served by the Port Terminal Railroad Association ("PTRA"). This is the largest polypropylene facility in the world, with a capacity of 2.7 billion pounds per year.

21. As noted earlier, TPI currently has { [REDACTED] } active grades of polypropylene, and there may be up to { [REDACTED] } specifications within each grade. Due to the many different grades of polypropylene, TPI must produce each grade in large batches and store them until sold. { [REDACTED]

[REDACTED]

[REDACTED] } Silos at La Porte are used for blending of product, but cannot be used for storage due to the continual need to blend for new production. Each La Porte silo has a



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that terminal – in other words, whether it would cause problems to other (i.e. truck) customers if product were used for the rail customer. If no product is available at a nearby bulk terminal, then TPI will make the same inquiry at other terminals progressively further away. If no product is available at any bulk terminal, then product must come from { [REDACTED] }. A railcar is switched to the transload area { [REDACTED] } and then transloaded into trucks for delivery to the customer. TPI must pay a truck transload fee and a rail switch fee of {{ [REDACTED] }} for this transload { [REDACTED] }.

26. TPI produces polyethylene at its plant in Bayport, Texas. While both the Union Pacific Railroad (“UP”) and the BNSF Railway (“BNSF”) have access to Bayport, BNSF currently originates all of TPI’s rail traffic at Bayport. This facility has a capacity of 900 million pounds per year. TPI currently has { [REDACTED] } active grades of polyethylene, and some grades have further sub-specifications. As with polypropylene, the existence of many different grades of polyethylene means that TPI must produce each grade in large batches and store them until sold.

{ [REDACTED] }  
[REDACTED] } Silos at Bayport are used for blending of product, but cannot be used for storage due to the continual need to blend for new production. Each Bayport silo has a capacity equal to one railcar. Upon production, TPI immediately loads polyethylene into rail cars.

27. In contrast to the La Porte polypropylene facility, Bayport does have a small amount of track space for railcar storage. This allows TPI to ship polyethylene directly from Bayport by both rail and truck. Because all product is loaded into railcars upon production, any truck shipments from Bayport must first be transloaded from rail to truck. When the Bayport

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storage tracks are full, rail cars are sent to { [REDACTED] }. Rail shipments from this location follow the same pattern described above for polypropylene.

28. As with polypropylene, truck options for polyethylene differ depending upon whether the truck delivery is to a regular truck delivery customer or a regular rail delivery customer. All regular truck delivery customers are served via rail-truck transload from nearby bulk terminals or from the Bayport plant if within a short distance. All regular rail delivery customers, when receiving a truck delivery, are served from the nearest bulk terminal with available product in the required grade and specification. If there is no available product at a bulk terminal, TPI will truck directly from Bayport, if the required grade and specification is available in a rail car stored at Bayport. The choice of last resort, because it is the most costly, is to transload from a SIT yard.

29. TPI produces polystyrene at a plant within its Styrenics Complex in Carville, Louisiana, which may also be called Bruns. This facility has a capacity of 1.65 billion pounds per year, and is the largest polystyrene facility in the world. It is located on the Canadian National Railway ("CN"). The Carville Styrenics Complex also produces styrene at TPI's Styrene Monomer Plant; some of this styrene is used as feedstock by the adjacent Polystyrene Plant. TPI currently has { [REDACTED] } active grades of polystyrene.

30. Upon production, polystyrene is immediately loaded into railcars. The storage situation at Carville is similar to La Porte and Bayport. The existence of so many different grades of polystyrene means that TPI must produce each grade in large batches and store them until sold. { [REDACTED]

[REDACTED] } Silos at Carville are used for blending of product,

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but cannot be used for storage due to the continual need to blend for new production. Each Carville silo has a capacity equal to one railcar.

31. Carville lacks much track space for railcar storage. Approximately 50% of Carville's polystyrene production is sent to SIT yards on CN { [REDACTED] } . The remainder is shipped directly from the plant. Although TPI can ship polystyrene directly from Carville by both rail and truck, all trucks must be loaded from a rail car.

32. Rail shipments of polystyrene from Carville, { [REDACTED] } follow the same pattern described above for polypropylene.

33. As with polypropylene and polyethylene, truck options for polystyrene differ depending upon whether the truck delivery is to a regular truck delivery customer or a regular rail delivery customer. All regular truck customers are served from nearby bulk terminals via rail-truck transload. All regular rail customers are served from the nearest bulk terminal with available product in the required grade and specification. If there is no available product at a bulk terminal, TPI will truck directly from Carville if the required grade and specification is available in a rail car stored at Carville. The choice of last resort, because it is the most costly, is to transload { [REDACTED] } .

**III. Response to CSXT Assertions In Motion Regarding Bulk Terminals**

34. I have reviewed the CSXT Motion, including the Verified Statements offered in support of that Motion. The Verified Statement of Gordon R. Heisler, in particular, warrants a detailed response. As an initial matter, though, TPI is troubled by the appearance of Mr. Heisler in this proceeding at all. As a member of the consulting firm Professional Logistics Group, Inc. ("PLG"), Mr. Heisler was part of the team that advised TPI in 2007 on its Eastern rail

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transportation strategies, including contract negotiations with CSXT. This work for TPI involved disclosure of commercially sensitive information to Mr. Heisler and PLG. A confidentiality agreement was signed between TPI and PLG to govern the relationship. See Exhibit 2.

35. I understand that Mr. Heisler contends that trucking from transload facilities provides effective competition to CSXT rail service for many of the challenged rates in this case. However, as described below, Mr. Heisler has not considered all relevant factors in his analysis. I also find it extremely ironic that Mr. Heisler now contends that TPI has significant competitive alternatives to CSXT rail service when the 2007 CSXT contract negotiations, which were a major reason that PLG was hired to advise TPI, resulted in an increase of 38% in the volume weighted average of CSXT's rail rates paid by TPI.

36. The most common limitation upon the use of trucks is the customer's lack of storage capacity at its facility. Customers routinely use TPI's private rail cars for storage, because they have little or no storage capacity at their facilities. In addition to selling its product to end-user customers without sufficient storage, TPI also sells to brokers which, as described above, are middle-men that purchase rail cars of product that they then resell to end-user customers. These brokers require rail car deliveries to bulk terminals of their choosing, where the commodity is stored in the rail car until resold. This storage service must be provided because TPI's competitors also provide this service.

37. TPI's ability to use bulk terminals for rail shipments depends heavily upon the available capacity at each terminal. Mr. Heisler does not appear to have considered this factor when he proposed to reroute the vast majority of the case lanes. Bulkmatic is one of the motor carrier terminal operators that Mr. Heisler contacted. I spoke with { [REDACTED] } the General

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Manager of Bulkmatic, who informed me that he had conversations and exchanged emails with Mr. Heisler; in these conversations, Mr. Heisler represented that he was working on a large distribution project, and couldn't discuss the details, or who was the shipper. Mr. Heisler asked for the overall capacity of the Bulkmatic transload terminals and whether they were full, but he did not ask about the available capacity.

38. Mr. Heisler also has suggested re-routing 18 case lanes through the NS Thoroughbred bulk terminal in Doraville, Georgia { [REDACTED] } . There are only 84 car spots at Doraville, and it typically is filled to the upper 70's. See Exhibit 5. When TPI inquired about Doraville's capacity to handle additional rail cars, the terminal responded that anything more than 1-2 additional cars would be a problem. Id. Since 2006, the 18 case lanes rerouted by Mr. Heisler through Doraville accounted for an average of { [REDACTED] } rail cars per year. I have provided a summary of the TPI rail volumes in each case lane that Mr. Heisler has proposed to reroute through each terminal. See attached Exhibit 6.

39. When considering possible truck deliveries to a TPI customer with rail access, the available terminal capacity to serve truck-only customers must be considered. As noted above, TPI loads all polymers initially into railcars, which are then sent to storage yards. When a customer cannot take delivery by rail, TPI dispatches the rail car to a bulk terminal near the customer that is within TPI's approved distribution network, where TPI transloads the commodity to trucks for final delivery to the customer. Therefore, in order to properly serve its truck-only customers, TPI cannot tie up bulk terminal capacity with rail cars that could be delivered directly to rail-served customers.

40. To control costs and maximize efficiency, TPI limits the number of bulk terminals it uses. Too many bulk terminals and/or motor carriers increases administrative costs by

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demanding more resources. For each facility, TPI conducts audits, continually inputs and manages system data, and manages the numerous service and operating issues that arise.

41. Use of too many bulk terminals also increases TPI's inventory costs. Multiple terminals means that TPI must store more product at more locations than it otherwise would if the inventory was more centralized. This problem is magnified by the large number of grades and specifications of the issue commodities. In addition, TPI must carry more inventory for customers at a bulk terminal than when the customer is served directly by rail, because the entire transit time through bulk terminals to the customer is longer. A rail car is not immediately available for unloading upon arrival at a bulk terminal because it takes 1-2 days for the terminal to receive the rail car into its inventory, and TPI typically must provide 3-5 days advance notice to the terminal of a truck order. This increases both TPI's inventory carrying costs and its rail car fleet requirements.

42. TPI has conducted two terminal optimization projects in just the past four years. Both projects concluded that the optimal number of terminals for TPI {{ [REDACTED] [REDACTED] }}. Therefore, TPI strives to maintain a terminal network of this size. In his Exhibit 7, Mr. Heisler identifies 34 terminals for transloading the issue traffic {{ [REDACTED] [REDACTED] }}.

43. Cost is not the only relevant issue with regards to bulk terminals. In order to ensure quality control and foster good customer service, all bulk terminals must be reviewed and approved to be part of TPI's product distribution network. As part of the approval process, TPI evaluates a bulk terminal's safety processes and procedures; security (e.g. fencing, lighting); capacity; paved loading areas; and motor carriers with access to the facility. TPI has a checklist

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of the items that it reviews when auditing a facility for its distribution network and when reviewing a new facility for possible addition to the network. See Exhibits 7 and 8.

44. Of the 34 terminals utilized by Mr. Heisler, only five are currently in TPI's approved network, and a sixth is currently undergoing certification by TPI. See Exhibit 6. Three of the 34 terminals would clearly not meet TPI's minimum requirements for certification. The KBSR Raub Yard, at Earl Park, Indiana, is just a rail siding and a scale located on a farm; the PAL Princeton, Kentucky facility lacks paving, fencing, and lighting, and has only a five rail car capacity; and the NS Thoroughbred terminal, at Pittsburgh, lacks fencing. Eleven of the terminals mentioned by Mr. Heisler could not be evaluated because of the lack of information regarding them in the Heisler V.S. and/or workpapers.

45. Mr. Heisler also envisions that transloading at Social Circle, Georgia provides effective competition to CSXT rail service in Lanes 1, 28, 116 (formerly A-1), 117 (formerly A-3), and 118 (formerly A-4). See Heisler V.S. at 12, and Exhibits 3 and 5. However, Social Circle is not a terminal – it is a lease track. TPI ships rail cars inbound to the lease track on the Great Walton Railroad (“GRWR”) at Social Circle (Lanes 1 and 28), where they are stored until later being shipped outbound to TPI's nearby customers (Lanes 116, 117 and 118).

46. Since Social Circle is both a destination and an origin, yet has no storage silos, Mr. Heisler's plan would require (1) rail cars being shipped by TPI to the NS terminal at Doraville, Georgia, (2) transloading onto trucks for a short movement to Social Circle; (3) reloading the product into railcars for storage; and (4) later transloading back to trucks for delivery to TPI's customers. In any event, Social Circle does not meet TPI's standards for a transload facility because it is not paved or gated, it is not tended, and it does not have a terminal

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operator on site. Also, Mr. Heisler incorrectly claims that NS can interchange with the GRWR. I have attached correspondence from NS in Exhibit 9, which disproves that allegation.

47. Mr. Heisler also ignores the ways in which brokers use bulk terminals. Many brokers operate out of bulk terminals where they have private agreements with the bulk terminal operator. Title to the product transfers to the broker upon shipment of a railcar from TPI, whereas title to the product typically would remain with TPI when the terminal is merely an intermediate storage point in the transportation from TPI to a customer who also is the end-user. The broker is responsible for arranging the final delivery to the end-user, not TPI.

48. Where a broker directs TPI to ship to a particular terminal, TPI does not have the ability to use alternate terminals. A broker may prefer one bulk terminal over another for a variety of reasons. These may include terminal capacity, proximity to the broker's customers, and the ability of the broker's contract motor carrier to access that terminal. In order to secure favorable rates and reserved capacity, a broker also may enter into long-term leases with a specific terminal. TPI is not privy to the specific reasons that its broker-customers require TPI to ship product to a specific terminal.

49. The extensive use of transloading envisioned by Mr. Heisler would require TPI to pay storage charges to the respective bulk terminals. Typically, a bulk terminal will grant 10 days of free time, after which there is a daily charge per rail car. For example, the NS Thoroughbred terminal tariff provides for a daily storage charge of \$50 from days 11-40 and \$90 thereafter.<sup>3</sup> See Exhibit 12. To enable a rough estimation of these storage charges, I have compiled a list of average rail car hold times for each case lane in the attached Exhibit 13. The average hold time by customer ranges from a low of 17 days to a high of 109 days.

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<sup>3</sup> Mr. Heisler proposes to reroute 65 lanes in his Exhibit 5 through Thoroughbred terminals.

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**IV. Historical Use of Trucking by TPI**

50. In the Motion, CSXT and Mr. Heisler repeatedly emphasized the alleged use of trucks by TPI for {{ [REDACTED] }} shipments of the commodities covered by TPI's complaint since the beginning of 2006. This figure, apparently based on documents produced in discovery by TPI, concerns shipments across North America; it is not limited to the traffic lanes at issue in this case. I have prepared Exhibit 4, which shows both the total trucks and railcars received by all TPI customers at each case lane destination. Because some destinations have multiple customers, some of which can only receive trucks, Exhibit 4 also shows the trucks received by just those customers whose traffic is at issue in this case.

51. For the overwhelming majority of the case lanes, fewer than 10% of the total volume received at each destination was delivered by truck from 2006 through June 30, 2010. In two lanes in Exhibit 4, there is a high percentage of trucks that is misleading.

52. Lane 56 involves polypropylene from Chicago to Terre Haute, Indiana, where TPI's customer is { [REDACTED] }. Lane A-2, meanwhile, involves polypropylene from Clinton, Indiana (CSXT lease track) to Atherton, Indiana, where the TPI customer is { [REDACTED] }. These are the same location. While there have been {{ [REDACTED] }} trucks since 2006 in Lane 56, these trucks must be compared not just to railcars in Lane 56, but also the number of railcars { [REDACTED] } in Lane A-2. Therefore, the total percentage of truck traffic to this customer is actually quite small {{ [REDACTED] }} when compared to the total rail traffic.

53. Lane 103 involves polypropylene from New Orleans to Beech Island, South Carolina. The customer for both rail and bulk truck is { [REDACTED] }. Although Exhibit 4 shows only 3 rail cars over this route, TPI also shipped { [REDACTED] } railcars of polypropylene into Beech

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Island via Memphis from February through October 2006. When this rail car volume is added to the 3 rail cars in the case lane, trucks accounted for only {{ [REDACTED] }} of deliveries to this location. When considering all the TPI rail traffic to Beech Island, the percentage of polypropylene sold to Pactiv in Beech Island by truck is {{ [REDACTED] }} not {{ [REDACTED] }}. Moreover, all {{ [REDACTED] }} trucks were delivered in January-February 2006. Before a customer purchases new product from TPI, there typically are a number of smaller volume test shipments. Because all of the truck shipments preceded any rail shipment, it is highly likely that these were test shipments, after which the customer began purchasing larger volumes by rail in the following months.

**V. Mr. Heisler's Use of "Surrogate Rates"**

54. I note that Mr. Heisler occasionally relied upon "surrogate rates" in developing his argument that effective competition exists for CSXT rail service on certain lanes. As described by Mr. Heisler and CSXT witness Benton Fisher, these surrogate rates were calculated based on URCS variable costs and an alleged average R/VC ratio from TPI rail contracts.

55. The calculation of these surrogate rail rates ignores many of the realities of real world rail rate negotiations. First, I have been repeatedly told by CSXT and other railroads that their rail rates are based on the market, not on their costs. Second, real-world rate negotiations take place on an aggregated basis, not lane-by-lane. CSXT would not offer TPI separate contract rates for each lane at issue in this case; it offered rates as a package. While some lanes may be reasonably priced in a contract offer, other lanes are not. TPI must evaluate such rate offers on an aggregate basis, because CSXT will not permit TPI to select the rates it likes for a contract and establish tariff rates for the rest. Consequently, when TPI rejected CSXT's contract offer, it had to reject both the acceptable and the unacceptable rates, and pay tariff rates that were unacceptable for every lane.

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56. After reviewing Mr. Heisler's Verified Statement, I contacted NS and requested a contract rate via some of the gateways and bulk terminals relied upon by Mr. Heisler. NS refused to quote a rate on any of those lanes. See Exhibit 10. The rates requested by TPI, and the corresponding case lanes, are:

- Memphis to Doraville TBT from a Houston Origin and a Bruns Origin: Case Lane No. 1.
- Memphis to Chattanooga TBT from a Houston Origin and a Bruns Origin: Case Lane Nos. 10, 53, 74, and 76.

NS informed me that its internal NS policy is not to quote rates to bulk terminals that would be used for truck transportation to customers served directly by CSXT because "that is a battle that NS cannot win."

57. Mr. Heisler has also claimed that use of certain gateways would provide effective competition to CSXT rail service. But some of these gateways are not permitted by the origin carrier's routing protocols. For example, he reroutes polystyrene shipments in Lane Nos. 13 (Memphis-Glasgow, KY), 25 (Memphis-Clarksville, TN), and 42 (Effingham-Warminster, PA), via East St. Louis. However, CN will not honor those interchanges.

58. Similarly, Mr. Heisler has failed to consider whether an origin carrier's proportional rates can be used for local movements. For all case lanes in his Exhibit 3, Mr. Heisler does not change the gateway, but he does terminate all of the traffic at a bulk terminal instead of interchanging with CSXT or another rail carrier. In fact, TPI must pay either {{{█}} } or {{█}} per rail car extra on ten of the lanes in Exhibit 3, if the movement terminates at the gateway on the origin carrier. I have identified those lanes in Exhibit 11.

59. Finally, CSXT took its most significant rate increases in 2007, when TPI's contract rates increased by a volume weighted average of 38%. Since then, CSXT has continued to take sizeable, but smaller, rate increases annually, including throughout the recent recession

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when motor carriers were reducing their rates. I have summarized TPI's rate history with CSXT for each case lane in Exhibit 1.

**VI. Response to CSXT and Heisler Assertions in Motion Regarding Specific Lanes**

60. Lane 18 involves transportation of polyethylene from Chicago to Cincinnati. Although Mr. Heisler claims that NS provides effective competition to CSXT rail service, neither of TPI's customers in Cincinnati are served by NS. {{ [REDACTED]

[REDACTED]

[REDACTED] }} See Reply Exhibit 2.

61. Lanes 67 and 108 involve transportation from Chicago to Akron, Ohio. The relevant commodities are polypropylene in lane 67 and polyethylene in lane 108. CSXT incorrectly claims that the destination in Akron is served by the Akron Barberton Cluster Railway ("AB"), which connects with both CSXT and the Wheeling & Lake Erie Railroad, which in turn connects with NS. Motion at 10; Heisler V.S. at 7. TPI's customer is { [REDACTED] [REDACTED] }, which is only served by the CSXT. To confirm this fact, I contacted { [REDACTED] }, the general manager of the AB, who confirmed that CSXT serves { [REDACTED] } in Akron, and not his railroad.

62. Lanes 109 and 110 involve transportation from Chicago to Lima, Ohio. The relevant commodities are polyethylene in lane 109 and polypropylene in lane 110. CSXT incorrectly claims that the destination is served by the Indiana & Ohio Railway ("IORY"), which allegedly would enable a connection to NS. Motion at 10; Heisler V.S. at 7. The destination in Lima is a CSXT captive facility operated by { [REDACTED] }, which operates two separate facilities in Lima: one on CSXT and the other on IORY. TPI's major customer in Lima is { [REDACTED] }, though other customers have received small volumes. { [REDACTED] } requires TPI to

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ship to the { [REDACTED] } location in the CSXT yard at { [REDACTED] }

Conversely, the address of the { [REDACTED] } facility on the IORY is { [REDACTED]

[REDACTED] } Moreover, { [REDACTED] } has confirmed to TPI that the IORY facility is at full capacity, which would explain why TPI must ship to the CSXT location.

63. Lane 70 involves transportation of polypropylene to Chattanooga, Tennessee. The TPI customer in Chattanooga is { [REDACTED] }, which takes delivery at a CSX TRANSFLO bulk terminal. { [REDACTED] } not TPI, has selected this particular terminal, and { [REDACTED] }, not TPI, is responsible for the truck transportation from the terminal { [REDACTED] }.

64. Lane A-2 involves transportation of polypropylene from Clinton, Indiana (CSXT lease track) to Atherton, Indiana, where the TPI customer is { [REDACTED] }. CSXT has claimed that there has been no traffic on this lane since the CSXT tariff first went into effect on July 1, 2010, but this is untrue. In fact, TPI has tendered { [REDACTED] } cars on lane A-2 since July 1, 2010.

65. Lane 37 involves transportation of polypropylene from New Orleans to Simpsonville, South Carolina, where the TPI customer is { [REDACTED] }. This is a new customer for TPI, and { [REDACTED] } sent its first purchase order to TPI { [REDACTED] } [REDACTED] }. See attached Exhibit 14.

66. Lane 69 involves transportation of polypropylene from Memphis to Gallaway, Tennessee, where { [REDACTED] } is the TPI customer. { [REDACTED] } is a past customer of TPI at Gallaway, and TPI hopes to secure that business once again. A reasonable rail rate is an important factor in TPI's ability to do so { [REDACTED] } [REDACTED] }. Therefore, all traffic must arrive via railcar.

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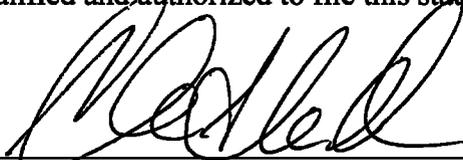
67. Lane 89 involves transportation of polystyrene from Memphis to Horse Cave, Kentucky, where TPI's customer is { [REDACTED] }. While there has been no traffic between July 1, 2010 and October 8, 2010, traffic remains possible in this lane based on our recent communication with the customer. { [REDACTED] } normally obtains polystyrene from its own facility { [REDACTED] }. However, { [REDACTED] } relies upon TPI for polystyrene whenever there is a problem with supply from { [REDACTED] }. See Exhibit 15.

68. Lane 91 involves transportation of polyethylene from New Orleans to Matthews, North Carolina. { [REDACTED] } is a past customer of TPI at Matthews, NC, { [REDACTED] }  
[REDACTED]  
[REDACTED] }

69. Lane 99 involves transportation of polystyrene from Effingham, Illinois to Mamaroneck, New York. CSXT's witness Mr. Karn incorrectly states that there has been no traffic on this lane since January 1, 2009. However, TPI shipped { [REDACTED] }.

**· VERIFICATION**

I, Allen Cast, verify under penalty of perjury that I have read the foregoing Verified Statement, that I know the contents thereof, and that the same are true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this statement.

  
\_\_\_\_\_  
Allen Cast

10/21/10

# Exhibit 1

**"Confidential Exhibit Redacted"**

# Exhibit 2

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 3

**"Confidential Exhibit Redacted"**

# Exhibit 4

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 5

**Laura HUNTER**

---

**From:** Joe McNamara [jmcnamara@rsilogistics.com]  
**Sent:** Friday, September 17, 2010 8:59 AM  
**To:** Laura HUNTER  
**Subject:** RE: Doraville Capacity

When we hit near 80. But each individual track has its max also and it changes daily. Thanks.

RSI Logistics  
Joe McNamara

---

**From:** Laura HUNTER [mailto:laura.hunter@total.com]  
**Sent:** Friday, September 17, 2010 9:42 AM  
**To:** Joe McNamara  
**Subject:** Doraville Capacity

*This is to confirm our phone conversation. You have 84 spots at Doraville, and are usually full to the upper 70s. One to two additional railcars would not be a problem, but anything in addition to that could be a potential issue.*

At what point do you consider Doraville full enough you need to start calling customers to get some railcars moving?

Thanks,

Laura Hunter  
Category Manager-T&D  
Trucking, Warehouse, and Packaging  
Total Petrochemicals, USA  
ph: 713-483-5318  
fx: 713-483-5025  
c: 281-409-7116

# Exhibit 6

**"Confidential Exhibit Redacted"**

# Exhibit 7

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 8

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 9

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**From:** Raber, Bob [mailto:robert.raber@nscorp.com]  
**Sent:** Tuesday, September 14, 2010 4:10 PM  
**To:** Allen CAST; Paul ARENDS  
**Cc:** Roehrig, John  
**Subject:** RE: Total to GRWR in GA

Allen/Paul, Unfortunately, I've just become aware that NS no-longer interchanges with the GRWR. Apologize if this has caused any confusion or inconvenience.

Bob Raber

---

**From:** Raber, Bob  
**Sent:** Tuesday, September 14, 2010 11:19 AM  
**To:** 'allen.cast@total.com'; 'paul.arends@total.com'  
**Cc:** Roehrig, John  
**Subject:** RE: Total to GRWR in GA

Allen/Paul, NS does interchange with the GRWR 5-days a week (Mon. thru Fri.), at Machen, GA. Let me know the business/consignee location, and I'll follow-up with the GRWR to check if they can deliver.

Thanks for the opportunity, Bob Raber

---

**From:** Roehrig, John  
**Sent:** Tuesday, September 14, 2010 11:11 AM  
**To:** 'allen.cast@total.com'; Raber, Bob  
**Cc:** 'paul.arends@total.com'  
**Subject:** Re: Total to GRWR in GA

Bob:  
Please advise per below.  
Thanks  
John R

Sent from my mobile email device

---

**From:** Allen CAST

**To:** Roehrig, John

**Cc:** Paul ARENDS

**Sent:** Tue Sep 14 08:47:11 2010

**Subject:** GRWR in GA

Here's a possible opportunity. Can you connect with the GRWR in Georgia. We show conflicting information on a connection in Machen. If you can connect, there might a great opportunity for the NS.

Allen

# Exhibit 10

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 11

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 12

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**NS 9328-F  
CANCELS  
NS 9328-E**

---

**NORFOLK SOUTHERN RAILWAY COMPANY**

**THOROUGHbred BULK TRANSFER**

**FREIGHT TARIFF NS 9328-F  
CANCELS  
FREIGHT TARIFF NS 9328-E**



**BULK TRANSFER TARIFF  
PROVIDING SERVICE  
ON  
DRY AND LIQUID COMMODITIES  
AT STATIONS NAMED IN ITEM 110**

---

**BULK RAIL -TRUCK TARIFF**

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**Governed by the Uniform Freight Classification UFC Series, See Item 5**

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**ISSUED: Dec 1, 2008**

**EFFECTIVE: Jan 1, 2009**

---

**Issued By  
C. J. Orndorff - Director Marketing Services  
NORFOLK SOUTHERN CORPORATION  
110 Franklin Road, S. E.  
Roanoke, VA 24042-0047**

TARIFF NS 9328-F

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

---

**PARTICIPATING CARRIER**

<b>ABBREVIATION</b>	<b>NAME OF CARRIER</b>
NS	NORFOLK SOUTHERN RAILWAY COMPANY

---

**ITEM 5**

**GOVERNING CLASSIFICATION AND EXCEPTIONS**

Governed by the provisions of UFC 6000 Series, Uniform Classification Committee, Agent, and NS Conditions of Carriage No. 1. (When shipments are made in Tank Cars, they will be subject to Rule 36 of the UFC except as to minimum weight, which will be shown in individual rate items.)

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**ITEM 15**

**EXPLOSIVES, DANGEROUS ARTICLES**

For rules and regulations governing the transportation of Explosives and other Dangerous Articles by freight, also specifications for shipper's containers and restrictions governing the acceptance and transportation of Explosives and other Dangerous Articles, see Bureau of Explosives Tariff BOE 6000 Series.

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**ITEM 20**

**REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.**

( A ) Where reference is made in this tariff to tariffs, circulars, 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 number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic.

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**ITEM 60**

**NATIONAL SERVICE ORDER**

This Tariff is subject to provisions of various Surface Transportation Board Service Orders and General Permits as shown in National Service Order Tariff NSO 6100 Series.

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**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.

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**TARIFF NS 9325-F**

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

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**ITEM 100**

**METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS**

Matter brought forward without change from one supplement to another will not be designated as "Reissued" by a reference mark. To determine its original effective date, consult the supplement in which the reissued matter first became effective.

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**ITEM 110**

**APPLICATION**

The provisions of this tariff will apply on Dry and Liquid commodities, in bulk, at designated Thoroughbred Bulk Transfer (TBT) facilities at the following locations:

<b>Delaware</b>	<b>Edgemoor</b>
<b>Florida</b>	<b>Jacksonville Miami</b>
<b>Georgia</b>	<b>Atlanta (Doraville) Augusta Dalton</b>
<b>Illinois</b>	<b>Chicago</b>
<b>Kentucky</b>	<b>Louisville Somerset</b>
<b>Maryland</b>	<b>Baltimore</b>
<b>Michigan</b>	<b>Detroit (Willis) Grand Rapids</b>
<b>New Jersey</b>	<b>Elizabeth Paterson</b>
<b>New York</b>	<b>Buffalo</b>
<b>North Carolina</b>	<b>Charlotte (Pineville) Winston-Salem North Winston-Salem South</b>

(Continued on next page)

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**TARIFF NS 9328-F**

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

---

**ITEM 110 (Concluded)**

<b>Ohio</b>	<b>Cincinnati (Clare) Cincinnati (Norwood) Cleveland (Euclid) Columbus (Fisher Road) Columbus (Freble Avenue)</b>
<b>Pennsylvania</b>	<b>Pittsburgh (Crafton)</b>
<b>South Carolina</b>	<b>Spartanburg</b>
<b>Tennessee</b>	<b>Chattanooga</b>
<b>Virginia</b>	<b>Richmond (Petersburg)</b>

Each TBT listed above is operated by an independent terminal operator (the "Terminal Operator"). The purpose of this tariff is to advise NS shippers of the services they may expect when utilizing a TBT and the services of a Terminal Operator, but arrangements for service at a TBT should be made between the shipper and the Terminal Operator.

Upon request of the shipper, the terminal services named herein will be performed on carload shipments in bulk as described herein (See Note 1), which move in NS line haul service to or from the above terminals, subject to the charges, rules and regulations published herein.

To arrange for terminal services specified in Item 110 at locations specified above, Shipper will notify terminal before actual shipment of product is made, advising the terminal of the commodity and the car number to be shipped.

**NOTE 1:** TBT facilities will handle Dry and Liquid Commodities in bulk when appropriate infrastructure and equipment for handling such Commodities are available. The Terminals will require shipper to provide Material Safety Data Sheets (MSDS) and will keep same on file at the terminal; product Handling Protocol for hazardous materials and such other information as may be required, including the need for special transfer equipment, personal protective equipment (PPE), pollution control, etc., prior to shipment of the commodity. NS reserves the right to refuse any commodity at its TBT facilities.

TARIFF NS 9328-F

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

---

ITEM 112

**MOTOR CARRIER ACCESS**

A shipper may retain a motor carrier to load or unload Commodity at TBT. In order to load or unload Commodity at a TBT, a motor carrier must execute an indemnity agreement among the motor carrier, NS and the Terminal Operator, covering the motor carrier's activities while at the TBT. When this agreement is fully executed, a motor carrier is "pre-approved". Carriers and their employees operating at TBT sites are required to conform to all such rules and procedures. A separate indemnity agreement must be executed at each location that the Operator is different.

All pre-approved motor carriers may deliver to or pull loads from a Thoroughbred Bulk Transfer Terminal. Motor carriers may be required to assist in the connection and loading or unloading of the trailer. The motor carrier will be responsible for its equipment at all times and the driver must remain with the vehicle while loading or unloading. The motor carrier will comply with all required safety procedures, which will include the removal of vehicle keys while loading Hazmat products. Authorized terminal personnel will load or unload all hazardous materials.

A motor carrier that is not pre-approved will not be allowed to enter a TBT, and the motor carrier driver must have a valid CDL (Commercial Driver's License) in his/her possession while conducting activities at the TBT. Motor Carrier driver must have a DOT hazardous materials endorsement if transporting hazardous materials.

Concerning self-loading, an administration charge of \$75 per trailer will be assessed to the shipper, if the motor carrier is not the Terminal Operator. This charge applies to the self-loading of dry and non-hazardous liquid products. (See Note 1) The motor carrier should only charge the shipper a transfer fee only with no administration charges.

**NOTE 1:** For the purposes stated herein, "self loading" shall be defined as a motor carrier using equipment affixed to its equipment to perform the physical transfer of Commodity. Self-loaders must also supply all hoses, fittings, etc. in addition to appropriate spill containment for the transfer of Commodity.

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**TARIFF NS 9328-F**

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

---

**ITEM 115**

**A. BASIC SERVICES INCLUDED IN A TRANSFER**

Unless otherwise agreed upon by the Terminal Operator and the customer, a transfer conducted at a TBT will include the following at no additional cost:

1. Weigh empty trailer.
2. Inspection of terminal transfer equipment for cleanliness. This does not include self-load equipment.
3. Verification of motor carrier's shipment documentation.
4. Sample contents of one compartment of non-hazardous rail car. Samples are to be taken from the bottom of the railcar. (Unless agreed upon by the shipper and terminal operator).
5. Perform non-self load transfer at negotiated charge.
6. Sample contents of inbound loaded non-hazardous trailer.
7. Seal loaded trailer and railcar from which product was removed.
8. Weigh loaded trailer.
9. Provide driver with scale ticket and product sample only if requested by the shipper or beneficial owner.

The Shipper and the Terminal Operator may agree upon the performance of services in addition to those listed above, at rates to be negotiated by the parties.

**B. APPLICATION OF TERMINAL SERVICES**

1. Prior to acquiring terminal services at a Thoroughbred Bulk Transfer facility listed in Item 110, shipper or beneficial owner must provide said terminal and NS a MSDS covering the commodity to be handled, and, for hazardous materials, a Handling Protocol outlining hazards and procedures for safe handling. All hazardous materials require pre-authorization by the terminal operator prior to billing any shipments to the terminal.
2. Norfolk Southern, through an Independent Contractor, will perform the services named herein on carload shipments of Commodity in bulk, subject to charges, rules and regulations published herein. Norfolk Southern reserves the right to refuse to handle any Commodity at its sole discretion.
3. All commodities must have MSDS sheet and on file at the terminal prior to arriving for terminal services. For shipments of hazardous materials a Handling Protocol must be on file at the terminal prior to arriving for terminal services. Commodity(s) arriving at a terminal before receipt of an MSDS and Handling Protocol (as applicable) will be held subject to Track Occupancy Charges as specified in Item 140 and no transfers will be accomplished until this information arrives.
4. Commodity(s) that Norfolk Southern declines to handle under the charges, rules and regulations published herein may, at Norfolk Southern's sole discretion, be handled under a separately negotiated contract.
5. Terminal services are restricted to carloads received or forwarded in Norfolk Southern line haul service, none of the facilities listed in Item 110 are open to any type of switching.

(Continued on next page)

TARIFF NS 8328-F

**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

ITEM 115 (Continued)

**C. UNLOADING OF RAIL CARS**

Charges for unloading of railcars to trucks and unloading trucks to railcars at a TBT will be determined on an individual basis by the Terminal Operator, but will not exceed the rates set forth in Item 115 section D.

The handling characteristics of the commodity, manpower requirements and the transfer equipment required will determine the charges. Any truck detention charges incurred during the loading or unloading process and any overtime charges (Item 150) will be the responsibility of the shipper. However, charges for the services listed below shall be no greater than that set forth below. Further, any shipper may at any time communicate with NS or the Terminal Operator if it believes the transfer charges to be non-competitive based on market conditions.

For safety reasons, TBT procedures require that at least two (2) terminal operator people be present during the transfer of any non-self load products. A truck driver on site qualifies as one of these people only if the product is a non-hazardous product. For self-load products only one (1) terminal operator employee, or one (1) qualified truck driver, will satisfy the safety requirement.

Transfer rates may not be bundled with any assessment or capital improvement requirements associated with the transfer.

**D. MAXIMUM TRANSFER CHARGES**

Applicable on shipments transferred from rail car to truck at the facilities listed in Item 110.

On commodities transferred in bulk, the following charges, subject to a minimum weight of 45,000 pounds per truckload per transfer, will be assessed for transfer at all Thoroughbred Bulk Transfer facilities.

**DRY BULK**

	<u>Per 100 pounds</u>
Mechanical Conveyor or Auger Transfers	\$0.35
Plastics ( STCC 28-211-XX )Transfers	\$0.33
Pressure Differential Transfers	\$0.33
Other dry Bulk Products	\$0.40
Hazardous Solids (Other than flammables)	\$0.47
Self- Loading [Non-hazardous products only]	\$75.00 per trailer

**LIQUID BULK**

	<u>Per 100 pounds</u>
Non-hazardous Liquids	\$0.33
Hazardous Liquids (Other than flammables)	\$0.47
Flammables	(Individually Priced)

(Continued on next page)

TARIFF NS 9328-F

**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

ITEM 115 (Concluded)

**SPECIAL SERVICES**

Additional scale weights	\$25.00 per weight
*first set of weights (inbound/outbound) included in transfer	
Tank Car Heating Charge	(Individually Priced)
Recirculation Charge	\$35.00 per hour
Inert Gas supplied by shipper or beneficial owner	\$30.00 per hour
Packaging	(Individually Priced)
Replenishment Loading	\$500.00 per Trailer

**NOTE 1:** The 49 Code of Federal Regulations, Table 172.101 (Hazardous Material Table), as may be revised from time to time, will be used to determine if a product is hazardous. NS reserves the right to refuse to handle ANY commodity at a TBT. Only authorized Terminal Operator personnel may transfer hazardous commodities. No preloaded tank trailers of hazardous materials are allowed on TBT property while the facility is closed, unless authorized by Operator and NS in writing.

**NOTE 2:** Multiple commodities may be loaded in a compartmentalized trailer for a charge of \$80.00 for each additional commodity or compartment loaded.

**NOTE 3:** A replenishment load is a reverse transload, truck to rail, not associated with an outbound rail movement. Replenishment loading of hazardous material is strictly prohibited.

**E. BILLING OF CHARGES**

Unless arrangements to the contrary are made prior to shipment, charges for terminal services described herein will be billed to the shipper or beneficial owner by the Terminal Operator, except that Track Occupancy Charges (Item 140) will be charged, established and billed by NS through its third party billing agents.

If credit privileges are granted (a determination made on an individual basis), terms for the payment of Track Occupancy Charges will be 15 days from the invoice date.

ITEM 125

**TERMINAL SERVICES**

**I. COMMODITY SAMPLING and INSPECTION**

Transfer charges in Item 115 include the visual inspection of the exterior of the railcar, and the exterior of the trailer.

NS and/or the Terminal Operator reserves the right to take samples of any commodity transferred at TBT facilities for its own purposes.

Top sampling of railcars must be agreed upon in advance by Shipper and Terminal Operator. Sample containers must be provided by Shipper at no cost to Terminal Operator. If a sample is requested, it must be taken at time of transfer; any samples that are requested to be taken at another time will be performed at a charge of \$50 per car.

(Continued on next page)

TARIFF NS 9328-F

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

---

ITEM 126 (Continued)

**II. SPECIAL SERVICES**

Services beyond the scope of those customarily provided by a terminal will be priced on an individual basis.

---

ITEM 130

**TERMINAL LIABILITY**

**I. LOSS OF WEIGHT**

Allowable transfer losses will be one percent ( 1% ) of the weight of the commodity on a six-month (January-June, and July-December) cumulative basis per shipper, per TBT, and such loss will be considered standard operating loss not assessable against NS or the Terminal Operator ( See note )

**NOTE 1:** Greater loss allowances may be required as a condition of acceptance for specific products when handling characteristics preclude complete unloading of the trailer or the railcar.

**II. LIABILITY LIMITS**

The liability of NS and/or the Terminal Operator with respect to activities in which each is engaged at TBTs shall be limited to the negligence of NS and the Terminal Operator in the performance of the services described in this tariff. Furthermore, neither NS nor the Terminal Operator shall be liable for consequential, indirect, special or punitive damages, interest, attorneys fees, or any amount in excess of product or car owner's actual loss concerning the commodity shipped or the equipment utilized.

**III. CLAIMS**

Only one claim for loss, damage and/or injury may be filed for each rail car handled under this tariff. No claim will be paid which is filed more than nine (9) months after product delivery or release of car from the terminal.

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TARIFF NS 9328-F

**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

ITEM 140

**TRACK OCCUPANCY CHARGES, DEMURRAGE, AND RELATED CHARGES**

**A. PRIVATE CAR TRACK OCCUPANCY CHARGES**

To the extent applicable, this item will apply on private cars (See Notes 1 and 2) constructively placed or actually placed at a TBT in lieu of demurrage provisions in Tariff NS 8004-Series. Track occupancy charges will be billed to shipper or beneficial owner of the Commodity on behalf of NS by or through its third party billing agent.

Once a rail car is constructively or actually placed (See Note 2), "free time" (including Saturdays, Sundays and Holidays) will be allowed as follows:

<u>Car Type</u>	<u>Free Days</u>	<u>Days 11 through 40</u>	<u>All Subsequent Days</u>
Covered Hopper Cars	10	\$50 per day	\$90 per day
Tank Cars	10	\$60 per day	\$90 per day

**B. RAILROAD CAR DEMURRAGE**

All railroad owned or controlled cars (See Notes 1 and 2) will be subject to demurrage under the provisions of Tariff NS 8004-A. Demurrage charges will be billed to the shipper or beneficial owner of the Commodity.

**C. NOTES AND OTHER CHARGES**

**NOTE 1:** A private car is a railcar bearing other than railroad reporting marks

**NOTE 2:** Constructive placement is the date the railcar is available to be switched into the TBT Terminal. Actual placement is the date the railcar was physically placed in the TBT Terminal.

**NOTE 3:** When a railcar is constructively or actually placed at a TBT and subsequently reshipped without any transfers having been made, a facility charge of \$500 will be assessed to the party issuing the reshipping instructions, in addition to all other applicable charges.

**NOTE 4:** At any time following actual placement of a railcar on a TBT facility, if 30 consecutive days pass without product being removed from a railcar, NS reserves the right to remove such car(s) from the TBT. The shipper of the railcar shall pay a charge of \$500 for this removal. This charge will be assessed each time a railcar sits for 30 consecutive days without product being removed and it becomes necessary to move the railcar. Track Occupancy Charges per this item will continue to accrue until such time as the car released empty.

TARIFF NS 9328-F

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

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**ITEM 150**

**HOURS OF SERVICE & OVERTIME CHARGES**

Normal working hours at the TBT Terminals are from 7:00 A.M. to 6:00 P.M., exclusive of Saturdays, Sundays and Holidays (See Item 185).

All loading, unloading, & service must be ordered before 5 p.m. the day prior to the day that loading, unloading, & service is needed. Every attempt will be made to accommodate emergencies and requested times, but loading spots and other circumstances may require occasional modifications of requested times.

When service is required prior to 7:00 A.M. or after 6:00 P.M., arrangements must be made with the Terminal Operator in advance. When loading, unloading, & services are to begin after 5 p.m., written authorization for overtime to complete the process (if required) must be submitted before the process begins. The charge for services before or after normal working hours will be at a rate of \$60 per person per hour or fraction thereof, in addition to all other applicable charges (See Exception).

When service is requested at the TBT on Saturdays, Sundays or Holidays (See Item 185), or when terminal personnel are required to make an extra trip to the terminal rather than performing continuous service, arrangements must be made in advance with the Terminal Operator. The charge for this service will be \$80 per hour per person subject to a four (4) hour minimum per person, in addition to all other applicable charges for service provided.

Authorization for overtime must be received in writing from the party responsible for paying terminal service charges.

**EXCEPTION:** No additional charges will be assessed if the motor carrier is at the TBT and ready for loading before 4:30 P.M., and the delay causing the overtime is the fault of the Terminal Operator.

---

**ITEM 160**

**ORDER PLACING**

The shipper or beneficial owner will be responsible for providing TBT with the name of the motor carrier authorized to transport the product, along with product transfer instructions. Such instructions may be initiated verbally but must be confirmed via facsimile, written communication, or through electronic means. Neither NS nor the Terminal Operator will be responsible for any problems concerning the shipment and performance of terminal services when the Terminal Operator has not received facsimile confirmation, or electronic communication covering each separate trailer from or to which Commodity is transferred.

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TARIFF NS 9328-F

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**RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

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ITEM 165

**RAIL CAR ARRIVING AT TERMINAL WITHOUT FULL WRITTEN DESCRIPTION OF LADING**

Any railcar arriving at a TBT without full written description of lading will be held at shipper's expense awaiting adequate and proper description or further instructions on disposition of lading. If such written description shows that the commodity is not one approved for transfer, that railcar will be released to shipper for disposition, subject to all applicable terminal charges, along with any other charges to which NS might be entitled.

---

ITEM 185

**HOLIDAYS**

Wherever in this tariff reference is made to "Holidays" it means the following:

New Years Day	Thanksgiving Day
President's Day	Thanksgiving Friday
Good Friday	Christmas Eve
Memorial Day	Christmas Day
Independence Day	New Years Eve
Labor Day	

(See Note)

**NOTE:** In the event one of the above Holidays occurs on a Sunday, the following Monday will be considered as the Holiday for the purpose of this tariff.

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ITEM 190

**EXPLANATION OF ABBREATIONS**

<b><u>ABBREVIATION</u></b>	<b><u>EXPLANATION</u></b>
BOE	Bureau of Explosives
CDL	Commercial Driver's License
MSDS	Material Safety Data Sheet
NS	Norfolk Southern Railway Company
NSO	National Service Order
PPE	Personal Protective Equipment
RER	Railway Equipment Register
STB	Surface Transportation Board
STCC	Standard Transportation Commodity Code
TBT	Thoroughbred Bulk Transfer
UFC	Uniform Freight Classification Committee, Agent

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THE END

# Exhibit 13

**"Confidential Exhibit Redacted"**

# Exhibit 14

**"Highly Confidential  
Exhibit Redacted"**

# Exhibit 15

**"Highly Confidential  
Exhibit Redacted"**