

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSXT-6
309443

FINANCE DOCKET NO. 36836

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April 9, 2025
Part of
Public Record

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

CSX TRANSPORTATION, INC.'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY
NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN
RAILWAY COMPANY AND NORFOLK &
PORTSMOUTH BELT LINE RAILROAD COMPANY

Pursuant to 49 C.F.R. § 1117.1, CSX Transportation, Inc. (“CSXT”) respectfully petitions the Surface Transportation Board (“Board” or “STB”) for an order compelling Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “NS”) and Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”) to produce documents and information that they produced or disclosed in the district court antitrust lawsuit against NS and NPBL, *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530-MSD (E.D. Va. Oct. 4, 2018) (the “District Court Proceeding”).

NS has already acknowledged that the information from the District Court Proceeding is relevant to the issues in NS’s application for control authority over NPBL. NS told the Board in its minor application that the District Court Proceeding record is “known by all and ready for presentation and argument” to the

Board. (NS Reply 35, Mar. 7, 2025; *see also* NS Reply 17 (offering to the Board that facts “examined in the federal courts” are “available to the parties and the Board.”)). But instead of honoring its representations to the Board that the district court record would be “ready for presentation” and is “available to the parties and the Board” in this proceeding, NS has decided to play games, raising three pretextual objections to obstruct CSXT’s access to these materials: (1) timing of discovery in this control proceeding, (2) relevance and (3) the district court Protective Order.¹ Each of these objections is baseless, reflecting NS’s desire to avoid fulsome discovery of its anticompetitive conduct, which is directly relevant to the Board’s standard of review in this proceeding.

First, in control proceedings, discovery is permissible once a proceeding is initiated by a prefiling notification. NS’s position that discovery cannot yet occur is inconsistent with the Board’s regulations and practice and completely inappropriate given the statutory deadlines faced by the Board in control proceedings and the factually complex nature of this matter. In any event, NS has forced CSXT to come to the Board seeking an order compelling discovery, and there is no conceivable

¹ On April 4, 2025, CSXT and NS conferred regarding NS’s objections. NS stood on its objections to producing any material from the district court record, highlighting its position that discovery is untimely before the STB sets a procedural schedule, the district court record is not relevant and is subject to the Protective Order in that case.

NPBL said it would consent to disclosure of the NPBL-produced documents in the District Court Proceeding. However, since NS objected to disclosure of any NPBL produced documents that refer to NS, it would be burdensome for NPBL to determine which documents fall within the scope of NS’s objection. Therefore, NPBL is withholding its consent to disclosure until the Board resolves the discovery dispute between CSXT and NS. *See* Ex. 1, NPBL Letter dated April 3, 2025.

argument that the Board lacks authority to issue the requested order compelling discovery.

Second, the district court discovery materials are clearly relevant to the issues before the Board. As the Board well knows, in a control proceeding such as this one, “the Board’s primary focus is on the anticipated competitive effects.” *Soo Line Corp.—Control—Cent. Maine & Quebec Ry. US Inc.*, FD 36368, slip op. at 4 (STB served May 4, 2020). The District Court Proceeding involved precisely the same issue that is the focus of this proceeding – the competitive effects of NS’s unlawful manipulation of NPBL to preclude CSXT’s access to NIT. To assert that the record of that proceeding is not relevant here defies credibility.

Moreover, the Board has already acknowledged that “any future decision concerning control would benefit from the findings of the district court” in the District Court Proceeding. *Norfolk S. Corp. & Norfolk S. Ry. Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co. (Decision No. 2)*, FD 36836, slip op. at 3 (STB served Mar. 14, 2025). The parties generated a substantial record in the District Court Proceeding, all of which is directly relevant to the threshold issue in this STB proceeding: whether as a result of the Board’s authorization of NS’s control of NPBL, “there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.” 49 U.S.C. § 11324(d)(1).

Third, NS’s contrived concern about the district court Protective Order is just another attempt to complicate and delay discovery. The district court Protective

Order has no bearing on CSXT's requests. NS's objection based on the Protective Order is a classic red herring. CSXT is only seeking information belonging to NS and NPBL that those parties previously produced or disclosed in the District Court Proceeding. The Protective Order does not govern what a party does with its own information, and it certainly does not act as a shield to prevent disclosure of that party's information in another litigation where the information is relevant.

NS and NPBL are wrongfully withholding the district court discovery materials in this matter. An order from the Board is necessary to compel their production.

1. Background

As the Board is aware, over the last four decades, NS has improperly controlled NPBL without the required Board authorization, allowing NS to transform NPBL from a neutral switching railroad into a tool wielded by NS to engage in anticompetitive conduct. Extensive background on the relevant facts underlying this dispute can be found in the following and is not repeated here:

- CSXT's Petition to Reject NS's Minor Application, *Norfolk S. Corp. & Norfolk S. Ry. Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co.*, FD 36836, (STB served February 27, 2025).
- CSXT's Complaint filed in the District Court Proceeding, *CSXT Transp. Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530 (E.D. Va. Oct. 4, 2018), ECF No. 1.²
- CSXT's Consolidated Opposition to Defendants' Motion for Summary Judgment filed in the District Court Proceeding, No. 2:18-cv-00530 (E.D. Va. May 3, 2021), ECF No. 328.³

² CSXT's Complaint is attached as Exhibit 1 to CSXT's Petition to Reject NS's Minor Application.

Additional background information on discovery before the district court, the examination of NS's anticompetitive conduct in other forums, and the nature of the current discovery dispute are all relevant to this Motion and are described below.

1.1. Discovery in the 2018 District Court Litigation

In 2018, CSXT sued NS, NPBL, and members of NPBL's Board of Directors in federal district court alleging that NS and NPBL committed antitrust violations beginning with the implementation of an exclusionary switch rate that prevented CSXT from competing at NIT. NS's exclusionary conduct through its unlawful control of NPBL resulted in substantial harm to competition, to intermodal shippers, and to CSXT.

The evidence presented in the District Court Proceeding of exclusionary conduct by NS and NPBL was extensive and was summarized in CSXT's Consolidated Opposition to Defendants' Motion for Summary Judgment, No. 2:18-cv-00530-MSD, 2021 WL 2373044 (E.D. Va. May 3, 2021), ECF No. 328. The district court concluded that CSXT had presented substantial antitrust claims based on the record developed and presented at summary judgment, but the Court dismissed CSXT's claims for monetary damages on statute of limitations grounds. *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679, 721, 727 (E.D. Va. 2023), *aff'd*, 114 F.4th 280 (4th Cir. 2024). The Court later dismissed CSXT's claims for

³ CSXT's Consolidated Opposition to Defendants' Motion for Summary Judgment is attached as Exhibit 2 to CSXT's Petition to Reject NS's Minor Application.

injunctive relief on jurisdictional grounds. *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530-MSD, 2023 WL 2552343, at *11 (E.D. Va. Jan. 27, 2023).

During the litigation, the parties produced 93,214 documents, conducted more than 40 depositions, and disclosed 5 expert reports pursuant to the Protective Order entered in the District Court Proceeding. The Protective Order in that proceeding allowed parties to designate information produced during discovery as “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY” and redact such information from public filings. Ex. 2, District Court Proceeding Protective Order ¶ 2. The filings in the District Court Proceeding rely heavily on documents designated as “confidential” or “confidential-attorneys eyes only” and therefore are heavily redacted.

As shown in the public versions of the documents attached to CSXT’s Petition to Reject NS’s Minor Application, the context of the documents and filings makes it clear that the redacted information is relevant to and would support CSXT’s claims in the control proceeding. However, the public versions of filings exist only for a portion of the district court record. Without access to the entire district court record, CSXT will be at a disadvantage as it prepares its case in the control proceeding.

1.2. Dismissal of District Court Claims – Additional Forum

Although the district court dismissed CSXT’s claims, it expressly noted that CSXT’s claims of anticompetitive conduct could be subject to investigation by the U.S. Department of Justice (“DOJ”). *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, No. 2:18-cv-00530-MSD, 2023 WL 2552343, at *9 (E.D. Va. Jan. 27, 2023). On

February 19, 2025, counsel for CSXT received a letter from the DOJ informing CSXT that the DOJ's Antitrust Division opened an investigation into the alleged exclusionary conduct undertaken by NS and NPBL against CSXT, in potential violation of Sections 1 and 2 of the Sherman Act, 15 USC §§ 1 and 2.

DOJ clearly considers the record in the District Court Proceeding to be relevant to its investigation of anticompetitive conduct by NS. On March 26, 2025, the DOJ issued a civil investigative demand ("CID") to CSXT pursuant to the Antitrust Civil Process Act, requiring CSXT submit to the DOJ all discovery, pleadings, filings, motions, transcripts, rulings, orders, written discovery, and expert reports, including any supporting documents and data, relating to the District Court Proceeding and *Norfolk Southern Railway Co. v. STB et al.*, Case No. 22-1209 (D.C. Cir.). DOJ's request includes discovery material that is designated as "confidential" or "confidential-attorneys eyes only" and subject to the Protective Order in the District Court Proceeding.

1.3. This Discovery Dispute

CSXT's allegations in the District Court Proceeding speak directly to its allegations in the control proceeding. Since the parties have already developed an extensive factual record in that proceeding, use of the district court record would result in significant efficiencies for the parties and the Board, especially given the statutory deadlines faced by the Board in control proceedings. To access the documents NS and NPBL designated under the Protective Order, CSXT requested that NS consent to disclosure of the district court record. NS refused.

Consenting to disclosure of the district court record would have been the most efficient and least burdensome course of action because the parties already exchanged the requested information during the District Court Proceeding. CSXT's counsel for the District Court Proceeding maintains these records in a litigation database. Upon receipt of written consent from NS and NPBL, CSXT's counsel for the STB proceeding could have accessed the responsive material immediately without further assistance from NS or NPBL.⁴ In addition to efficiency, this approach would have mitigated costs associated with drafting and responding to written discovery requests.

Notwithstanding these efficiencies, NS chose to be obstructionist and directed CSXT to serve written requests. CSXT served document requests on NS and NPBL requesting the seven categories of documents that would have been immediately available to CSXT had NS and NPBL consented to their disclosure. These categories of documents include:

- Documents NS/NPBL produced in the District Court Proceeding.
- Documents NS/NPBL filed in the District Court Proceeding.
- NS/NPBL initial disclosures from the District Court Proceeding.
- Deposition records from the District Court Proceeding, including but not limited to, transcripts of each deposition, corresponding exhibits, video recordings and errata.

⁴ Additionally, three third parties made small productions in the District Court Proceeding. CSXT would not use those documents for purposes of this case until it obtains written consent from the third parties. Those documents bear bates numbers with unique prefixes that can easily be segregated from the overwhelming majority of the district court discovery materials.

- Declarations, affidavits or other sworn statements NS/NPBL made relating to the District Court Proceeding.
- Expert reports NS/NPBL disclosed in the District Court Proceeding.
- NS/NPBL's responses and objections to written discovery in the District Court Proceeding, including requests for production, interrogatories and requests for admissions.

Ex. 3, CSXT's First Requests for Production to NS; Ex. 4, CSXT's First Request for Production to NPBL.

On April 3, 2025, NS and NPBL served their objections. NS took the position that the requests were untimely, overbroad, and unduly burdensome. Ex. 5, NS Responses and Objections to CSXT's First Requests for Production. NPBL, on the other hand, expressed willingness to disclose the district court record, but was unwilling to do so until NS's objections were resolved. Ex. 1, NPBL Letter dated April 3, 2025. On April 4, 2025, CSXT and NS conferred regarding NS's objections. NS stood on its objections to producing any material from the district court record, highlighting its positions that discovery is untimely before the STB sets a procedural schedule, the district court record is not relevant, and the district court record is subject to the Protective Order in that case.

2. Arguments

2.1. Discovery is Timely

NS's argument that discovery is untimely—and that the Board must enter an order allowing discovery—is meritless. It seems that NS is attempting to exploit the statutory deadlines faced by the Board in control proceedings to artificially compress the time period available to take discovery. NS cites no STB precedent for

its claim that discovery is untimely. Moreover, NS's position is inconsistent with the Board's regulations and discovery practice and is completely inappropriate in a case as factually complex as this one.

Indeed, the Board's regulations clearly provide that discovery may be conducted at any time after a proceeding is initiated. Under the Board's rules at 49 C.F.R. § 1114.21(a)(1), "[p]arties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding." No purported permission from the Board is necessary for discovery to begin. "All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval." *Id.* at § 1114.21(b).

NS's assumption that parties must hold off on discovery until permitted by the Board to begin discovery is flatly inconsistent with prior cases. For example, in *Navajo Transitional Energy Company, LLC v. BNSF Ry. Co.*, NOR 42179, slip op. at 4 (STB served Aug. 7, 2023), the Board explicitly stated that its "regulations do not prevent parties from starting discovery before a procedural schedule is issued," citing 49 C.F.R. § 1114.21(b). In *Norfolk S. Ry. Co.—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Ry. Co., Inc.*, FD 35873 (STB served May 15, 2015), the Board rejected a commenter's argument that the Board had erred in failing to provide for discovery in its procedural schedule. *Id.*, slip op. at 8. The Board stated that its regulations "clearly provide for discovery," and that the commenter "could have served the parties in this matter with discovery requests *at any time* under the Board's regulations." *Id.* (emphasis added). In *Riverview Trenton*

R.R. Co.—Acquisition & Operation Exemption—Crown Enterprises, Inc., FD 33980 (STB served Feb. 15, 2002), the Board noted that a party had filed a request that the Board issue a procedural schedule and asked that “time be set aside for discovery.” *Id.*, slip op. at 11 n.17. Citing 49 C.F.R. § 1114.21(b), the Board stated that the party “required no authority from [the Board] to undertake discovery if it wished to do so.” *Id.*

In STB control proceedings, discovery is permissible once a proceeding is initiated by a prefiling notification. For example, in *CP/KCS*, Canadian Pacific Railway Limited and additional entities (collectively, “CP”) filed on March 22, 2021, a notice of intent to file an application seeking to control Kansas City Southern Railway Company (“KCS”). On May 27, 2021, CP filed a petition asking the Board, among other things, to confirm that KCS was obligated to provide CP with information CP needed to complete its application. *See CP/KCS*, FD 36500, slip op. at 3 (STB served Aug. 2, 2021). In a decision served on August 2, 2021, the Board confirmed that CP could “seek materials from [KCS] through the discovery process in this proceeding that [were] relevant to its preparation of an application for authority to acquire control of [KCS] and [could] do so now without first filing an application in this docket or an inconsistent application in Docket No. FD 36514.” *Id.*, slip op. at 4.⁵ Here, in *Decision No. 2*, the Board declined to reject NS’s

⁵ Similarly, in *CSX/Pan Am*, discovery was served and CSXT produced documents before the Board issued a decision accepting the application and issuing a procedural schedule. On February 25, 2021, Applicants filed a minor application and proposed procedural schedule. *CSX Corp.—Control & Merger—Pan Am Systems, Inc. (CSX/Pan Am)*, FD 36472 (STB served Feb. 25, 2021). On May 17,

February 14, 2025, submission and instead stated that it will treat NS's submission as a prefiling notification, thereby opening the proceeding. *Decision No. 2*, slip op. at 7, 7-8 n.8. Accordingly, discovery should be allowed to proceed immediately.

The temporal limits on discovery proposed by NS are an inappropriate attempt to constrain the development of a full record in this proceeding and to run out the clock in a proceeding with tight statutory deadlines. Additionally, NS is trying to impede discovery and limit the time for discovery by refusing to comply with valid discovery requests and instead forcing CSX to seek relief at the Board through a motion to compel. In any event, CSX now seeks a Board order compelling discovery, and there would be no basis to argue that the Board lacks authority to issue such an order. Accordingly, CSX asks that the Board act promptly to order the requested discovery and admonish NS not to attempt further obstructionist litigation tactics in this proceeding.

2.2. The District Court Record is Relevant to the Control Proceeding.

The full district court record is obviously relevant in this proceeding. The Board allows parties to obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding.” 49 C.F.R. § 1114.2(a)(1). Information is relevant when it could impact the outcome of a proceeding. *See Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C.*

2021, Amtrak served discovery requests on CSXT. On June 1, 2021, CSXT served its responses and objections to Amtrak’s requests and on July 16, 2021, CSXT produced documents in connection with Amtrak’s requests. On July 30, 2021, the Board issued a decision accepting the application and issuing a procedural schedule.

§ 24308(a)—*Canadian Nat’l Ry.*, FD 35743, slip op. at 8 (STB served Sept. 23, 2014). A party is generally entitled to all relevant and potentially admissible information and is not limited to only “the information that [a party] believes is sufficient” to prove its case. *See Seminole Electric Coop., Inc. v. CSX Transp., Inc.*, NOR 42110, slip op. at 2 (STB served Feb. 17, 2009).

The district court record is relevant to the Board’s resolution of the control proceeding because the record in that proceeding focused on the anticompetitive effects of NS’s manipulation of NPBL and therefore overlaps completely with the statutory review standard in this control proceeding which focuses on the same anticompetitive effects of NS’s manipulation of NPBL.

The Board will not approve a control application if the “anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.” 49 U.S.C. § 11324(d)(2). Under 49 U.S.C. § 11324(d), the Board must approve the transaction unless it finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. *See, e.g., Canadian Pac. Ry. Co.—Control—Dakota, Minnesota & E. R.R. Corp.*, FD 35081, slip op. at 8 (STB served Sept. 30, 2008).

The Board has stated that, in assessing transactions subject to 49 U.S.C. § 11324(d), “*the Board’s primary focus is on the anticipated competitive effects.*” The

Board must approve an application unless there would be adverse competitive impacts that are both ‘likely’ and ‘substantial.’” *Soo Line Corp.—Control—Cent. Maine & Quebec Ry. US Inc.*, FD 36368, slip op. at 4 (STB served May 4, 2020) (emphasis added).

Even if the Board were to find that there would be a likely and substantial lessening of competition or creation of monopoly or restraint of trade, the Board must approve the transaction “unless the anticompetitive impacts outweigh the public interest in meeting significant transportation needs . . . and cannot be mitigated through conditions.” *Canadian Nat’l. Ry. Co. & Grand Trunk Corp.—Control—Iowa N. Ry. Co.*, FD 36744, slip op. at 6 (STB served Jan. 14, 2025).

Thus, in this control proceeding, the Board must consider the same issue that was examined in the District Court Proceeding—the anticompetitive effects of NS’s control over the NPBL. In the District Court Proceeding, NS, NPBL, and CSXT disputed the competitive effects of NS’s unlawful control over NPBL. *CSX Transportation, Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679 (E.D. Va. 2023), *aff’d*, 114 F.4th 280 (4th Cir. 2024). The Court determined that CSXT “had identified sufficient direct and circumstantial evidence of an agreement between [NS] and NPBL in and around 2009 that was aimed (and may have unlawfully succeeded) at erecting barriers to [CSXT’s] ability to provide on-dock rail service at NIT.” *Id.* at 727. In other words, through discovery and related litigation, CSXT developed evidence in the District Court Proceeding of anticompetitive conduct by NS and NPBL – and the anticompetitive effects of that conduct. Since the Board

must consider the same anticompetitive effects of the same NS's conduct, the full district court record should be made available to the parties in this control proceeding.

The Board has already acknowledged the relevance of the documents in the district court record when it said that “any future decision concerning control would benefit from the findings of the district court.” *Norfolk S. Corp. & Norfolk S. Ry. Co.—Acquisition of Control—Norfolk & Portsmouth Belt Line R.R. Co. (Decision No. 2)*, FD 36836, slip op. at 3 (STB served Mar. 14, 2025). Likewise, DOJ recognized the relevance of the district court discovery materials to its investigation of NS's anticompetitive conduct when it issued a CID to CSXT seeking the full record developed before the district court.

Because the central factual issues in the District Court Proceeding – NS's unlawful control over NPBL and the anticompetitive effects of that conduct – are before the Board in this proceeding, the entire district court record is relevant to this proceeding. NS acknowledged this reality when in its minor application NS told the Board that the district court record is “known by all and ready for presentation and argument” to the Board. (NS Reply 35, Mar. 7, 2025.) In fact, NS repeated its commitment to make the district court record available, offering: “[t]he facts experienced over the past 42 years of service are known and speak for themselves. They have been reviewed and examined in the federal courts, and that analysis (as desired by the Board) is available to the parties and the Board.” (NS Reply 17,

Mar. 7, 2025.) NS has repeatedly acknowledged the relevance of the documents it now seeks to withhold.

2.3. The District Court Protective Order does not Limit NS or NPBL's Production of Their Own Materials.

NS's objection that CSXT's Requests for Production run afoul of the district court Protective Order is a classic red herring. CSXT does not seek from NS or NPBL any information that NS or NPBL received from another party in the District Court Proceeding. CSXT is seeking only information and facts from NS and NPBL themselves. The Protective Order does not govern what NS and NPBL do with their own information, and it does not shield from discovery information that is relevant to the STB proceeding simply because that information was produced in the District Court Proceeding. NS's objection is simply another ruse for impeding and delaying the discovery of information that will shed light on its anticompetitive practices.

NS and NPBL have two options to respond to the discovery requests: (1) grant consent to CSXT to access the materials it already has in its possession for use in this case; or (2) reproduce their respective materials from the District Court Proceeding. CSXT first requested that NS consent to CSXT's access to the district court record for use in this case. Had NS accepted this request, it would have required no action from NS other than consenting to CSXT's request. However, as explained in Section 1.3 above, NS refused to consent to disclosure and instead suggested that CSXT serve written discovery requests. Following NS's refusal to consent, CSXT served written discovery requests that asked both NS and NPBL for the district court discovery materials that they produced, respectively.

Parties can reproduce their own documents and the statements from their witnesses without implicating the district court Protective Order. The Protective Order restricts the receiving party's use of designated material but explicitly allows the designating party to use its own discovery material for other purposes.

Paragraph 5 of the District Court Proceeding Protective Order provides:

Each Party and all other persons bound by the terms of this Protective Order shall use material designated CONFIDENTIAL or CONFIDENTIAL – ATTORNEYS EYES ONLY *by any party other than itself* solely for purposes of this Action, and not for any other purpose whatsoever.

Ex. 2, District Court Proceeding Protective Order ¶ 5 (emphasis added).

Paragraph 6 of the Protective Order reiterates that the obligations are on the receiving party, not the producing party:

Subject to the exceptions...in this Protective Order... the Receiving Party *shall not disclose* such document or portion or the contents thereof to others *unless by specific order of this court or by written consent of the Producing Party*. (emphasis added).

Ex. 2, District Court Proceeding Protective Order ¶ 6 (emphasis added). NS and NPBL, as the producing parties, can use their own discovery material however they choose.

Under this regime, CSXT, as the receiving party, can only use material designated by NS and NPBL for purposes of the District Court Proceeding, unless an exception applies. One exception is that NS or NPBL consents to the use of the materials it designated for purposes beyond the District Court Proceeding. The Protective Order provides:

Except with the prior written consent of the producing Party (“Producing Party”), any Material that the Producing Party designates as CONFIDENTIAL or CONFIDENTIAL-ATTORNEYS EYES ONLY shall be considered “Protected Material” and shall not be disclosed to any person or used for any purpose except as expressly permitted in this Protective Order. . . .

Ex. 2, District Court Proceeding Protective Order ¶ 2 (emphasis added). As noted previously, CSX sought from NS “prior written consent of the producing Party.” NS withheld that consent.

Moreover, courts have found that a party that produced material subject to a protective order in one case, cannot later avoid discovery in a subsequent case by shielding itself under the terms of that protective order. *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 501 (D. Md. 2000) (explaining there is “something unsettling about the notion that [a producing party] might forever be insulated from producing discovery in this, or other actions, by virtue of having once produced it in a protected fashion in the [earlier action]”); *Carter-Wallace Inc. v. Hartz Mountain Indus. Inc.*, 92 F.R.D. 67, 69 (S.D.N.Y. 1981) (finding the documents could be disclosed because the obligations of the protective order were not on the producing party). In the District Court Proceeding, the obligations under the Protective Order are on the receiving party and therefore, both NS and NPBL can produce the discovery materials CSXT requests without implicating the Protective Order.⁶

⁶ The reproduction of the district court discovery record imposes little burden on NS and NPBL. District court counsel for the parties still have the district court record in their possession. That production is likely maintained in an e-discovery database or a central filing system. Reproducing these documents to CSXT’s STB counsel would require several hours of paralegal time, at most. This is not a heavy

Additionally, the district court Protective Order anticipates the situation where the STB or another agency orders the production of the district court discovery materials, providing:

If another court or an administrative agency subpoenas or orders production of material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY that a Party has obtained under this Protective Order, such Party shall promptly notify the designating Party of the pendency of such subpoena or order.

Ex. 2, District Court Proceeding Protective Order ¶ 31. But that provision only addresses information that a Party has obtained from someone else under the Protective Order. The Protective Order does not affect information that is already in the possession of the Party because it belongs to the Party itself. And even if this provision were relevant, CSXT is only seeking an order directing NS and NPBL to provide the discovery materials that they produced or proffered in the District Court Proceeding, so the “designating Party” will already be notified by serving NS and NPBL with this motion.

At bottom, CSXT’s document requests ask NS and NPBL to produce the district court materials that each party produced or proffered in the District Court Proceeding. This approach, whereby litigants reproduce their own materials, does not implicate the district court Protective Order. Moreover, the district court materials will be covered by the protective order that the Board has entered in this proceeding. Alternatively, should the Board enter an order compelling production of

lift given the nature of the dispute and that NS already committed to the Board that the record was available.

the district court discovery materials, NS or NPBL could satisfy that order by consenting to CSXT accessing the materials for use in this proceeding. Such an election by NS or NPBL would further reduce any burden to the parties. Indeed, there would be no burden on NS or NPBL whatsoever, because they would not need to produce a single document.

3. Conclusion

For the foregoing reasons, BNSF requests that the Board grant this Motion to Compel and direct NS and NPBL to consent to the use of the district court discovery material in this proceeding or to reproduce all documents responsive to the discovery requests discussed herein within one week of the Board's order granting this Motion.

Dated: April 9, 2025

Respectfully submitted,

/s/ Peter W. Denton

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *CSX Transportation Inc.'s Motion to Compel Production of Documents by Norfolk Southern Corporation and Norfolk Southern Railway Company and Norfolk & Portsmouth Belt Line Railroad Company* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Counsel for CSX Transportation, Inc.
April 9, 2025

Exhibit 1

NPBL Letter

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April 3, 2025

VIA ELECTRONIC MAIL

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Re: **Docket No. FD 36836**
Norfolk Southern Corporation and Norfolk Southern
Railway Company – Acquisition of Control –
Norfolk and Portsmouth Belt Line Railroad Company

Dear Peter:

I am responding on behalf of Norfolk and Portsmouth Belt Line Railroad Company (“NPBL”) to the First Set of Requests for Production Documents dated March 19, 2025 from CSX Transportation, Inc. (“CSXT”) to NPBL in the above-captioned proceeding at the Surface Transportation Board. CSXT’s discovery requests seek various NPBL documents from the judicial proceedings in *CSX Transportation, Inc. v. Norfolk Southern Railway Company and Norfolk & Portsmouth Belt Line Railroad Company*, No. 2:18-cv-00530 (E.D. Va.) (the “District Court Proceeding”). My understanding is that CSXT is already in possession of the documents sought in its discovery requests as a result of its own participation in the District Court Proceeding.

As CSXT indicated in its CSXT-4 filing at the Board dated March 20, 2025, however, significant portions of the record in the District Court Proceeding are designated as confidential under the Stipulated Protective Order in the District Court Proceeding attached to the CSXT-4 filing and can only be used “solely for the purpose of [the District Court Proceeding].” Stipulated Protective Order, ¶ 5. As CSXT also noted in its CSXT-4 filing, a party may consent to disclosure of material it has designated as confidential “beyond the terms of this Protective Order” Stipulated Protective Order, ¶ 24. We understand CSXT’s document production requests to NPBL to effectively seek such consent for those materials from the record in the District Court Proceeding already in CSXT’s possession.

NPBL would be willing to provide such consent, provided the confidentiality of any responsive NPBL material in the District Court Proceeding record would be treated with a

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Peter W. Denton, Esq.
April 3, 2025
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comparable confidentiality designation under the protective order issued by the Board in Decision No. 1 in this proceeding. Norfolk Southern Railway Company (“NS”), however, has indicated to NPBL that it “objects to NPBL producing any documents that include or refer to any NS documents or deposition that was part of the court case below and remains subject to the court’s Attorney’s Eyes Only Protective Order.” The CSXT-4 filing anticipated a discovery dispute between NS and CSXT along similar lines. It would be exceedingly burdensome, if possible at all, for NPBL to parse out which of its responsive documents in the District Court Proceeding fall within the scope of NS’s objection. NPBL is thus withholding its consent to disclosure of the documents sought in CSXT’s document production requests to NPBL until such time as the Board resolves the relevant discovery matter between NS and CSXT. NPBL will proceed promptly upon issuance of such a Board decision, and in accordance with its guidance.

Please feel free to contact me if you have any questions regarding this matter. Kind regards.

Very truly yours,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler

TJL/tl

cc: William A. Mullins, Esq.

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Peter W. Denton, Esq.

April 3, 2025

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Exhibit 2

District Court Proceeding Protective Order

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

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

Plaintiff,

V.

Civil Action No. 2:18-cv-00530-MSD

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

Defendants.

**STIPULATED PROTECTIVE ORDER GOVERNING
THE HANDLING OF CONFIDENTIAL INFORMATION AND
THE NON-WAIVER OF INFORMATION SUBJECT TO ATTORNEY-CLIENT
PRIVILEGE AND/OR WORK PRODUCT PROTECTION
PURSUANT TO FED. R. EVID. 502(d)**

THIS MATTER came before the Court on the Joint Motion for Entry of Stipulated Protective Order Governing the Handling of Confidential Information and the Non-Waiver of Information Subject to Attorney-Client Privilege and/or Work Product Protection Pursuant to Fed. R. Evid. 502(d) (“Joint Motion”) filed by plaintiff CSX Transportation, Inc. (“CSXT”), and defendants Norfolk Southern Railway Company (“NS”), Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”), Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss (each a “Party,” and collectively, the “Parties”). Pursuant to Federal Rule of Civil Procedure 26(c) and Federal Rule of Evidence 502(e), the Parties, through their respective attorneys, hereby jointly request that the following Order be entered in the above-captioned case (the “Action”) to govern:

(i) the exchange of discovery material by the Parties and/or by third parties, (ii) the use or exhibition of documents and things during discovery, (iii) testimony containing trade secrets or confidential or proprietary research, development, technical, financial, strategic, competitive, customer, or commercial information, as well as other kinds of commercially sensitive information within the meaning of Fed. R. Civ. P. 26(c)(1)(G), and (iv) the non-waiver of information subject to attorney-client privilege and/or work product protection.

The Parties and this Court agree that the disclosure of such commercially sensitive information poses a substantial risk of harm to the legitimate proprietary interests of the Parties and third parties. Therefore, good cause exists for entry of this Order to preserve the confidentiality of certain documents and information, to outline procedures for and reasonable restrictions on the disclosure of sensitive materials, and to permit discovery to proceed without delay. The Parties and this Court further agree that good cause exists for entry of this Order to protect the Parties to the Action, to the fullest extent permissible by law, against any waiver of any attorney-client privilege and/or work product protection in this or any other federal or state proceeding that might otherwise arise from the disclosure, production, or exchange of information in this Action, and to outline procedures for handling the clawback of such protected information.

Accordingly, the Court hereby enters the following Order, which shall control (i) the disclosure, dissemination, and use of confidential and/or proprietary information in this Action, and (ii) the clawback of information subject to attorney-client privilege or work product protection following the disclosure of the same, which shall be deemed a non-waiver:

PROTECTION OF CONFIDENTIAL INFORMATION

1. This Order shall govern confidential and/or proprietary information disclosed during discovery in this Action, including, but not limited to, documents, things, requests, and

responses to requests for production of documents and things, interrogatory answers, deposition testimony, answers to requests for admissions, expert reports, requests and responses to discovery demands, as well as any copies, notes, abstracts, or summaries of such information. The provisions of this Order shall not affect, and this Order does not limit, the use or admissibility of such protected information or material or references to such information or material as evidence at trial, or during a hearing or similar proceeding in this Action or as part of the record on appeal, provided that any Party may seek an appropriate Court Order to protect such material.

2. Except with the prior written consent of the producing Party (“Producing Party”), any Material that the Producing Party designates as CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY shall be considered “Protected Material” and shall not be disclosed to any person or used for any purpose except as expressly permitted in this Protective Order. The Producing Party may designate as “CONFIDENTIAL” any Material that it produces in this Action which contains confidential, non-public financial, sales, marketing, customer or cost/pricing information, and confidential and proprietary internal business, strategic planning, or tactical information, as well as any other information or record that the Producing Party believes in good faith must or may be protected from disclosure in accordance with the Federal Rules of Civil Procedure or other applicable law (collectively “Confidential Material”). Any Party to this Litigation, or any third party who elects to be covered by this Protective Order, may designate Material as “CONFIDENTIAL—ATTORNEYS EYES ONLY” to the extent it qualifies for designation as CONFIDENTIAL and, in addition, if the designating Party believes in good faith that disclosure to the Parties would create a substantial risk of serious injury to the designating Party (“Confidential—Attorneys Eyes Only Material”). Confidential Material and Confidential – Attorneys Eyes Only Material are collectively “Protected Material” under this order.

3. The Parties submit that the following categories of information that may be discovered under this Protective Order may qualify as trade secrets or some other properly demarcated category of legitimately confidential information and accordingly may be Confidential Material or Confidential—Attorneys Eyes Only Material, regardless of the form such information may take, including, but not limited to, documents, things, requests and responses to requests for production of documents and things, interrogatory answers, deposition testimony, answers to requests for admissions, expert reports, and other requests and responses to discovery demands, as well as any copies, notes, abstracts, or summaries of such information, whether produced informally or in response to requests for production of documents or things, interrogatories, requests for admissions, or other formal methods of discovery:

- Research and development data;
- Pricing information, including sales and profits;
- Financial data, including sales, marketing, and costs data;
- Confidential business information; and/or
- Identities and lists of customers and vendors.

4. If discovery is sought from a non-party to this Action, the words “Party” and “Parties” herein shall be read to include that non-party once that non-party informs the Parties to this Action in writing or by e-mail that it is invoking the terms of this Protective Order. Any such non-party shall have all the rights and all the responsibilities set forth under this Protective Order, including the responsibilities with respect to any material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY that it receives. Additionally, any such non-party shall have standing to appear in this Action to file motions and oppose motions, as necessary, to protect such non-party's rights in its Confidential Material.

5. Each Party and all other persons bound by the terms of this Protective Order shall use material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY by any Party other than itself solely for the purpose of this Action, and not for any other purpose whatsoever. The receiving Party (“Receiving Party”) shall not make any copies, duplicates, extracts, summaries, or descriptions of Confidential Material except as may be reasonably necessary in the litigation of this Action. This Order shall be fully applicable to all such copies, duplicates, extracts, summaries, or descriptions of Confidential Material.

6. Confidential Material that is produced by a Party shall be clearly marked or stamped with the legend “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY.” Such legend shall be placed on every page of a multi-page document. Such legend need not be placed on the original document of the Producing Party but instead may be placed upon copies produced or exchanged. Subject to the exceptions set forth below in this Protective Order, as to each document or portion so marked, the Receiving Party shall not disclose such document or portion or the contents thereof to others unless by specific order of this Court or by written consent of the Producing Party. All Confidential Material not reduced to documentary or tangible form or which cannot be conveniently designated in the manner set forth above, such as models or electronic files, shall be designated by the Producing Party by informing the Receiving Party in writing and/or by so labeling the media on which electronic files are produced.

7. Interrogatories or the answers thereto, requests for admissions or the responses thereto, motions, briefs, memoranda, correspondence, and other documents prepared, produced, served, and/or filed in connection with this Action, or portions of the foregoing, containing Confidential Material or quoting or referring to the substance of any Confidential Material may be similarly designated or treated as CONFIDENTIAL in accordance with the provisions and

procedures of this Protective Order.

8. All or part of any oral or written deposition testimony may be designated CONFIDENTIAL either (a) at the time the testimony is given, or (b) within eight (8) days following receipt of a transcript by written notice to the court reporter, with a copy of the notice to counsel for each Party to the Action of the specific pages and lines of the transcript that contain Confidential Material. Such written notification shall then be attached by the Receiving Party and/or the reporter to the transcript and each copy thereof in its possession, custody, or control. All deposition transcripts shall be treated as CONFIDENTIAL in their entirety until eight (8) business days following receipt of the transcript unless receipt of confidentiality designations is received earlier. Deposition exhibits previously designated CONFIDENTIAL need not be re-designated to retain their status as Confidential Material. If a Party designates an entire deposition as CONFIDENTIAL, that Party shall, within eight (8) days of receiving a copy of the deposition transcript, de-designate any non-confidential portions or confirm in writing that the entire transcript shall remain designated CONFIDENTIAL.

9. In the event the Producing Party elects to produce Confidential Material for inspection, as opposed to, for example, delivering documents or things, no marking need be made by the Producing Party in advance of the inspection if the Producing Party otherwise informs the Receiving Party of its intention to so designate the produced material, and all information produced for inspection shall be treated as CONFIDENTIAL during the inspection. Thereafter, upon selection by the inspecting Party of specified documents or things for copying, the copies of such documents that contain Confidential Material shall be marked appropriately.

10. Information that becomes available to a Party via inspection, measuring, analyzing, or testing of any sample or thing marked CONFIDENTIAL or which is prepared or derived by

utilizing such a sample or thing shall also be considered to be CONFIDENTIAL.

11. Absent written consent from the Producing Party or unless otherwise directed by the Court, Protected Material may be disclosed only to the following persons:

- a. Individuals who are Party to this action in their individual capacities;
- b. With respect to business entities who are Party to this action, no more than two individuals employed by the Receiving Party who are directly and actively involved in assisting with the prosecution or defense of this Litigation, whose identities have been previously disclosed to the Parties, and who must have agreed to be bound by this Protective Order by signing a confidentiality agreement substantially in the form of Attachment A (the "Business Personnel"), except that, upon the Receiving Party's identification of Business Personnel, the Producing Party shall have five (5) days to petition the Court to challenge such designation. Until the Court issues a decision, no Confidential Material shall be disclosed to such Business Personnel without prior written consent of the Producing Party;
- c. Outside counsel of record for the Parties;
- d. In-house counsel for the Parties who are actively involved in assisting with the prosecution or defense of this Litigation;
- e. Outside experts or consultants who are not regular employees of a Party but are retained on behalf of any of the Parties by their outside counsel to assist in the preparation of this case;
- f. Outside photocopying, graphic production services or litigation support services employed by the Parties' counsel to assist in this Litigation, and computer service personnel performing duties in relation to a computerized litigation system;

- g. The Court, court reporters, videographers, stenographers, and court personnel;
 - h. The direct staff of, and any contract support personnel employed or retained by, any of the foregoing persons, provided that such persons are actively involved in assisting with the prosecution or defense of this Litigation; and
 - i. Any person who is an employee of the Producing Party, or a former employee of the Producing Party (if they were employed by the Producing Party when the Confidential Material was created).
12. Absent prior written consent from the Producing Party or unless otherwise directed by the Court, Confidential-Attorneys Eyes Only Material may be disclosed only to the following persons:
- a. Outside counsel for the Receiving Party, their employees and outside photocopying, graphic production services or litigation support services assisting such counsel, and computer service personnel performing duties in relation to a computerized litigation system;
 - b. The Court, court reporters, videographers, stenographers, and court personnel, as are necessarily incident to depositions, hearings or trial;
 - c. Outside experts or consultants who are not regular employees of a Party but are retained on behalf of any of the Parties by their outside counsel to assist in the preparation of this case; and
 - d. Any person who is an employee of the Producing Party, or a former employee of the Producing Party (if they were employed by the Producing Party when the AEO Material was created).
13. If any Party believes in good faith that its in-house counsel who are actively

involved in assisting with the prosecution or defense of this Litigation, or if an individual, the Party himself, requires access to Confidential-Attorneys Eyes Only Material to effectively assist in this Litigation, the Party may provide written notice to the designating Party, identifying in good faith specific, limited Confidential-Attorneys Eyes Only Material to which it believes such access is required. The designating Party shall consider any such request in good faith and, to the extent feasible and not unduly burdensome, produce a second version of the specified Confidential-Attorneys Eyes Only Material that redacts discrete pieces of information, such as specific figures, statements, or information that the designating Party in good faith believes warrant a designation of CONFIDENTIAL—ATTORNEYS EYES ONLY. The redacted version shall be subject to the same restrictions and protections as Confidential-Attorneys Eyes Only Material, except that it may be disclosed to in-house counsel or individual defendant who is/are actively involved in assisting with the prosecution or defense of this Litigation. To the extent the Parties cannot after good faith efforts reach agreement on any such request, either Party may seek appropriate relief from the Court.

14. Outside experts and consultants shall not be permitted access to material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY unless and until they agree in writing to be bound by this Protective Order by signing a confidentiality agreement substantially in the form of Attachment A. Disclosing outside counsel shall retain the original of all executed confidentiality agreements.

15. No disclosure of Confidential Material or Confidential-Attorneys Eyes Only Material shall be made by any person authorized to have access thereto to any person who is not authorized for such access under this Protective Order. The Parties shall safeguard all designated material to protect against disclosure to any unauthorized persons or entities.

16. Should any Receiving Party file any Confidential Material or Confidential-Attorneys Eyes Only Material with the Court, that Party must file a separate and specific motion filing that material under seal pursuant to Local Civil Rule 5 of the United States District Court for the Eastern District of Virginia ("Local Civil Rules"). The filing Party must comply with Local Civil Rule 5 and its procedures. Further, with regard to material filed under seal, the Parties shall (a) follow the procedures set forth by this Court and Local Civil Rule 5 and (b) shall file a redacted version where possible of the filed document in compliance with the CM/ECF Procedures of the Court and Local Civil Rule 5.

17. The Parties shall limit their CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY designations solely to information which they in good faith believe to fall within the scope of this Protective Order. No Receiving Party shall be under any obligation to object to the designation of any document or information at the time such designation is made or at any time thereafter, and no Party shall, by failure to object, be found to have acquiesced or agreed to such designation or be barred from objecting to such designation at any time.

18. Should any material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY under this Protective Order be disclosed through Inadvertent/Mistaken Disclosure by the Receiving Party to any person not entitled to receive the material, there shall be no waiver or loss of confidentiality. The inadvertently/mistakenly disclosing Party shall immediately inform counsel for the Producing Party of the Inadvertent/Mistaken Disclosure. The inadvertently/mistakenly disclosing Party shall also exercise all reasonable efforts to retrieve any such Confidential Material or to Confidential-Attorneys Eyes Only Material disclosed to persons not authorized to receive the Confidential Material or to Confidential-Attorneys Eyes Only Material under this Protective Order and to ensure

that no further or greater unauthorized or Inadvertent/Mistaken Disclosure and/or use thereof is made.

19. A Party may object to the designation of particular “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY” information by giving written notice to the Party designating the disputed information. The written notice shall identify the information to which the objection is made. If the Parties cannot resolve the objection, it shall be the obligation of the Party designating the information as “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY” to file an appropriate motion within ten (10) business days after the notice is received requesting that the Court determine whether the disputed information should be subject to the terms of this Protective Order. If such a motion is timely filed, the disputed information shall be treated as designated by the Producing Party under the terms of this Protective Order until the Court rules on the motion. If the designating Party fails to file such a motion within the prescribed time, the disputed information shall lose its designation and shall not thereafter be treated in accordance with this Protective Order. In connection with the motion filed under this provision, the Party designating the information as “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY” shall bear the burden of establishing that good cause exists for the disputed information to be so designated and treated under the terms of this Protective Order.

20. A designation of Confidential Material or Confidential-Attorneys Eyes Only Material may be made at any time as to materials produced during the litigation. The inadvertent, mistaken, or unintentional disclosure (“Inadvertent/Mistaken Disclosure”) by the Producing Party of Confidential Material or to Confidential-Attorneys Eyes Only Material without having so designated the material shall not be deemed a waiver in whole or in part of Producing Party's claim of confidentiality if written notice is given to the Receiving Party promptly after the

discovery of the Inadvertent/Mistaken Disclosure and/or non-designation. Within five (5) business days of providing such written notice of the Inadvertent/Mistaken Disclosure and/or non-designation, the Producing Party shall re-produce appropriately designated materials, and the material that was inadvertently/mistakenly disclosed and/or non-designated and all copies thereof shall be immediately returned to the Producing Party or destroyed. Upon receipt of written notice of Inadvertent/Mistaken Disclosure and/or non-designation under this paragraph, the Receiving Party shall exercise all reasonable efforts to retrieve and/or limit disclosure of the Confidential Material or to Confidential-Attorneys Eyes Only Material to persons not authorized to receive such materials under this Protective Order.

21. The restrictions set forth in this Order regarding the protection of confidential information shall not apply or shall cease to apply to any material or information that:

- a. at the time of disclosure hereunder, was already lawfully in the possession of the Receiving Party and was not acquired from any third party under obligation of confidence to the Producing Party;
- b. after disclosure hereunder, is acquired by the Receiving Party from a third party lawfully possessing the same and having no obligation to the Producing Party hereunder;
- c. after disclosure hereunder, is developed by the Receiving Party independently of any Confidential Material or to Confidential-Attorneys Eyes Only Material obtained from the Producing Party;
- d. after disclosure hereunder, is disclosed to a third party by the Producing Party without an obligation of confidentiality;
- e. prior to the disclosure, was available to the public, or subsequent to the disclosure,

has become available to the public through no fault of the Receiving Party; or

- f. that is used or admitted in open court without objection; the Parties shall be permitted to raise any objections until the Parties' deadline to file with the Court a notice of intent to request redaction of the transcript of the Court proceeding.

22. Nothing contained in this Order shall be construed to require production of Confidential Material or to Confidential-Attorneys Eyes Only Material deemed to be privileged or otherwise protected from discovery.

23. Nothing contained in this Protective Order shall be construed to require production of material the disclosure of which would breach an express or implied agreement by the disclosing Party with a third party to maintain such information in confidence, but such withheld materials will be properly identified by disclosing Party on a privilege log.

24. Nothing contained in this Protective Order shall prevent disclosure beyond the terms of this Protective Order if the Party designating the material CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY consents to such disclosure or if the Court orders such disclosure.

25. At the conclusion of this Action, including any appeals, the originals and all copies of Protected Material, including electronic copies and including those provided to outside experts and other third parties, but excluding those provided to the Court, shall be returned to the Producing Party or destroyed, at the election of the Producing Party, except that neither Party nor the Court shall be obliged to return or destroy any materials or any photocopies thereof that were: (a) admitted into evidence at trial or at any hearing; or (b) incorporated, as an exhibit, appendix, or otherwise, as part of a document filed with or submitted to the Court. To the extent the communication or information in question may exist on any computer or back-up media which

cannot be reasonably deleted, it may be retained until such time as the media is subject to routine deletion or destruction, provided that no person attempts to access the contents of the communication or information unless allowed under the terms of this Order. Notwithstanding this provision, counsel shall be entitled, without violating this Protective Order, to retain archival copies of pleadings, affidavits, declarations, motions, briefs, expert reports, correspondence (including email and internal correspondence), any other papers or materials filed with the Court, deposition transcripts, the trial record, and attorney work product (regardless of whether such materials contain or reference information designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY), and any attachments or exhibits to any such categories of documents, so long as the materials are governed by this Protective Order. Written certification of compliance with these post-conclusion requirements shall be provided to the Producing Party not later than sixty (60) days after final termination of this Action. Any Party's failure to provide such post-conclusion certification of compliance may be relied upon by the Producing Party as such certification.

26. The terms of this Order shall survive the final termination of this Action to the extent that any Protected Material is not or does not become publicly available.

27. This Order shall be binding upon the Parties hereto, upon their attorneys, and upon the Parties' and their attorneys' successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, officers, directors, employees, agents, and independent contractors and other persons or organizations over which they have control.

28. Nothing in this Order shall bar or otherwise restrict any attorney herein from rendering advice to the attorney's party-client with respect to this Action, and in the course thereof, relying upon an examination of material designated CONFIDENTIAL—ATTORNEYS EYES

ONLY, provided that, however, in rendering such advice and in otherwise communicating with the party-client, the attorney shall not disclose any material designated CONFIDENTIAL—ATTORNEYS EYES ONLY or the substance of such material to anyone not authorized by this Protective Order to receive such material.

29. This Order is not intended to govern the use of material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY at the trial of this Action. Procedures governing the use of material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY at trial will, if necessary, be established by separate order, pursuant to application to the Court by one or more of the Parties, after the Parties have met and conferred in a good faith attempt to reach agreement on the terms of such an order. Nothing in this Protective Order shall preclude any Party from moving the Court to seal the courtroom, trial exhibits, or trial transcript in order to preserve the confidential nature of any material designated as CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY.

30. This Order may be amended by further order of the Court and is without prejudice to the rights of any Party to move for relief from any of its provisions or to seek or agree to different or additional protection for any particular material or information.

31. If another court or an administrative agency subpoenas or orders production of material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY that a Party has obtained under this Protective Order, such Party shall promptly notify the designating Party of the pendency of such subpoena or order.

32. Each person or entity who receives any material designated CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY agrees to subject himself/herself to the jurisdiction of this Court for the purpose of any proceedings relating to the performance under,

compliance with, or violation of this Protective Order. This provision will not waive or be considered relevant to the subject matter and personal jurisdiction defenses raised by any defendant.

NON-WAIVER OF PRIVILEGE AND OTHER PROTECTIONS

33. Pursuant to Fed. R. Evid. 502(d), the disclosure or production of a communication or information protected by the attorney-client privilege, work product doctrine, and/or any other privilege or immunity that is made in connection with this Action shall not constitute a waiver of any claim of attorney-client privilege, work product protection, and/or other privilege or immunity available with respect to that communication or information in this or any other federal or state proceeding under any circumstances. This Order applies regardless of whether the communication or information disclosed or produced describes or relates to this Action.

34. A Receiving Party is under a good faith obligation to promptly alert a Producing Party if a communication or information is disclosed or produced by the Producing Party that appears to be protected by the attorney-client privilege, work product doctrine, and/or any other privilege or immunity on its face or in light of facts known to the Receiving Party.

35. To effectuate a clawback, upon learning of the production of privileged or otherwise protected communications or information, the Producing Party who made the disclosure shall send written notice of the production to all Receiving Parties. The Producing Party need not provide any explanation or evidence regarding the reasonableness of the efforts taken to prevent production, and the Receiving Parties agree not to challenge the reasonableness of such efforts. The notice shall identify the communication or information that was produced (including the format of the production—e.g., paper, electronically stored information) and the date(s) of production. If the Producing Party claims that only a portion of the communication or information

is protected, the Producing Party shall provide a new copy of the communication or information with the allegedly privileged or protected portions redacted.

36. Within five (5) business days of sending the written notice, the Producing Party also shall provide the Receiving Parties with a privilege log for the communication or information providing the following information: date, author(s), custodian(s), recipient(s), file type, and subject (to the extent the subject does not reveal protected content). In addition, the Producing Party shall also provide for each document on their privilege log an identifier for the privilege being asserted (e.g., “ACP” for attorney-client privilege, “WP” for work product, or other descriptions as necessary based on the specific privilege being claimed), a description of the contents of the document that, without revealing information itself privileged or protected, is sufficient to understand the subject matter of the document and the basis of the claim of privilege or immunity, the Bates range for the document(s), and a unique document number/identifier that need not be formatted as, or consecutive with, Bates numbers of produced documents (e.g., “Def_Priv_00001”).

37. Upon determination that a communication or information received is privileged or protected in whole or in part, or upon receipt of notice from the Producing Party that a privileged or protected communication or information has been disclosed or produced, a Receiving Party must promptly: (a) return and/or destroy the original and all copies, including any electronic copies, of the protected communication or information; (b) destroy all notes or other work product reflecting or referring to the content of such material; and (c) certify in writing that the Receiving Party has complied with this section. To the extent the communication or information in question may exist on any computer or back-up media which cannot be reasonably deleted, it may be retained until such time as the media is subject to routine deletion or destruction, provided that no

person attempts to access the contents of the communication or information unless allowed under the terms of this Order. If a Receiving Party used, shared, or disclosed the communication or information prior to notification, it must take reasonable steps to retrieve and prevent further use or distribution of the communication or information. This duty expires only if this Court rules that the communication or information is not privileged or protected.

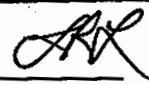
38. If a Receiving Party contests the claim of privilege or other protection in good faith, then within ten (10) business days of receiving the Producing Party's notice, it may move for a ruling that the communication or information is not protected by the attorney-client privilege, work product protection and/or other privilege or immunity. Pending resolution of said motion, a Receiving Party may retain a single copy of the communication or information subject to the motion in a secure location, but it may not be used, shared or disclosed in any way prior to the Court's resolution of the motion, except among counsel for use as to the motion. If the Court denies the motion contesting the claim of privilege or other protection, then within ten (10) business days of the Court's Order, the Receiving Party must promptly (a) return and/or destroy the original and all copies, including any electronic copies, of the protected communication or information; (b) destroy all notes or other work product reflecting or referring to the content of such material; and (c) certify in writing that the Receiving Party has complied with this section.

39. Nothing in this Order shall be construed to limit a Party's right to conduct a review of documents, ESI, or information (including metadata) for relevance and responsiveness and/or require the production of any communication or information that a Party contends is covered by the attorney-client privilege and/or the work product protection.

40. Until such time as this Order has been entered by the Court, the Parties agree that, upon execution by the Parties, it will be treated as though it had been "So Ordered."

It is so ORDERED.

Date: October 29, 2019
Norfolk, Virginia

/s/
Lawrence R. Leonard
United States Magistrate Judge 
United States Judge

CSX TRANSPORTATION, INC.

Date: October 25, 2019

By its attorneys,

/s/

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Benjamin L. Hatch (VSB No. 70116)
Jeanne E. Noonan (VSB No. 87963)
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**NORFOLK SOUTHERN RAILWAY
COMPANY**

Date: October 25, 2019

By its attorneys,

/s/

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**NORFOLK & PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Date: October 25, 2019

By its attorneys,

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Date: October 25, 2019

By its attorneys,

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CANNON MOSS

Date: October 25, 2019

By his attorneys,

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Exhibit 3

CSXT's First Requests for Production to NS

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

**CSXT's First Set of Requests for Production of Documents
to Norfolk Southern Corporation & Norfolk Southern Railway Company**

Pursuant to 49 C.F.R. § 1114.30, CSX Transportation, Inc. ("CSXT") hereby requests Norfolk Southern Corporation and Norfolk Southern Railway Company (together, "NS") produce all documents responsive to the requests below (the "Requests," and each a "Request") to the offices of Steptoe LLP, 1330 Connecticut Avenue NW, Washington, DC 20036, or via electronic delivery means, in accordance with the Definitions and Instructions below and within 14 days or such other time as may be agreed upon by the parties or ordered by the Surface Transportation Board.

DEFINITIONS

The following Definitions apply to each Request contained herein and are deemed incorporated in each Request.

1. "Action" shall mean Norfolk Southern Corporation & Norfolk Southern Railway Company – Acquisition of Control – Norfolk & Portsmouth Beltline Railroad Company, FD 36836, filed before the Surface Transportation Board.
2. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.
3. "Any" shall be construed as "all" and vice versa, as necessary to bring within the scope of the Request all information that might otherwise be construed to be outside of its scope.
4. "CSX Transportation, Inc." or "CSXT" shall mean CSX Transportation, Inc., and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives,

attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

5. “District Court Proceeding” shall mean *CSX Transportation, Inc. v. Norfolk Southern Railway Company*, No. 2:18-cv-00530 (E.D. Va. Oct. 4, 2018).

6. “Document” or “Documents” is used in the broadest possible sense permissible and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether printed or recorded (through a sound, video, or other electronic, magnetic, or digital recording system) or reproduced by hand, of the following: letters, correspondence, telegrams, telexes, memoranda, records, text messages, communications via Internet-connected application, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, “Post-It” or similar notes, stenographic notes, notes, notebooks, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronic messages, voice mail messages, interoffice communications, advertising, packaging and promotional materials, material of any sort and in any format maintained or available at any time on the World Wide Web (whether formerly, currently, or both), and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out.

7. “Including” shall mean “including, without limitation” and “including but not limited to.”

8. “Norfolk Southern” or “NS” shall mean Norfolk Southern Corporation, Norfolk Southern Railway Company and their predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

9. “NPBL” shall mean Norfolk & Portsmouth Belt Line Railroad Company and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives,

attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

10. “Relating to” as used herein with reference to a subject shall mean both of the following:

- a. Containing, compromising, constituting, stating, setting forth, recording, contradicting, referring to, evidencing or in any way pertaining to, in whole or in part, that subject; and
- b. Describing, discussing, reflecting, interpreting, identifying, concerning, in any way pertaining to, in whole or in part, that subject, or to be in any way logically or factually connected with the matter discussed.

11. “You” and “Your” shall refer to NS as defined above.

12. The use of the singular shall be deemed to include the plural, as appropriate in context.

INSTRUCTIONS

The following Instructions apply to each Request set forth herein and are deemed incorporated in each Request:

1. In responding to these Requests, produce all Documents within the possession, custody, or control of NS, which includes in NS’s actual or constructive possession or control, including, without limitation, Documents, tangible things, and electronically stored information located in personal files, hard copy files, computer systems, smartphones, Internet-enabled messaging applications, networks, servers, CDs, DVDs, memory sticks, zip drives, hard drives, floppy disks, magnetic tapes, and other electronic media.

2. If there is no Document responsive to a particular Request, NS shall so state in writing.

3. If any Document or Communication called for by any Request is withheld because NS claims that it is privileged or otherwise protected from disclosure, NS must identify the Document or Communication so withheld and the privilege or doctrine NS claims. In the case of Documents of Communications that NS claims are privileged that relate to meetings or to other conversations, all participants in the meeting or conversation shall be identified.

4. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction (except for information that is both non-responsive and commercially sensitive), expurgation, or excisions, regardless

of whether NS considers the entire Document to be relevant or responsive to these Requests. If NS has redacted any portion of a Document for privilege, stamp the word “redacted” on each page of the Document which NS has redacted, identifying the basis for such redaction.

5. NS must produce entire Documents including all attachments, cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any produced Documents. Copies that differ in any respect from an original shall be produced separately.

6. If NS objects to any Request or part of a Request, set forth the basis for NS’s objection with particularity and respond to all parts of the Request to which NS does not object.

7. All responsive Documents in existence as of the date of production are to be produced. These Requests are continuing in nature, up to and during the course of any hearing. Any Documents created or obtained after the date of production are to be produced under NS’s obligation to supplement NS’s production immediately upon the creation or identification of additional responsive Documents.

8. For any responsive Documents that are no longer in existence, indicate the nature of the Document, its approximate date of creation, its author(s), and recipient(s), its approximate date of destruction or disposal, and the reason for and method by which its destruction or disposal took place.

9. All Documents responsive to these Requests shall be produced in accordance with any applicable rules and orders of the Surface Transportation Board, and subject to any agreement negotiated by and between the parties regarding the production of electronically stored information (“ESI”).

10. ESI should be produced in accordance with the following specifications:

- a. Form of Production. Produce electronically stored information in single-page TIFF format (Group IV TIFF at 300 dpi) with standard Concordance formatted load file (.dat), including all metadata. Name each TIFF file with a unique name matching the Bates number (or similar identifying mark) labeled on the corresponding page. Group every 1000 TIFFs into a new folder; do not create a separate folder for each document.
- b. Image Load File. Provide an image load file (Opticon file) that contains document boundaries and page counts.
- c. Document Text. For documents that were originally stored as

native electronic files and which do not have redactions, produce the extracted full text (not OCR) from the body of each document in separate document-level *.txt files named for the beginning Bates number of the associated document. Provide OCR text for documents without extracted text available (non-searchable PDFs, etc.). Group 1000 document text files per incrementally named "TEXT" directories, separate from image directories. For documents that were originally stored as native electronic files and which have redactions, produce the OCR text from the redacted image(s) associated with each document, in separate document-level *.txt files named for the beginning Bates number of the associated document. Clearly label any redacted material to show the redactions on the TIFF image.

- d. Native Production For Certain File Types. For files that reasonably require viewing in their native format for a full understanding of their content and meaning (including but not limited to certain PowerPoint or other special presentation programs or database files), produce the files in native and TIFF formats to the extent it is reasonably possible to do so. Name the produced native file with the Bates number on the first page of the corresponding TIFF production of the file / document or on the TIFF placeholder document (i.e. "slipsheet"). For Excel files, produce in native format with a slip sheet that includes a Bates number and text indicating "This document was produced in Native format." Group native files within incrementally named "NATIVE" directories; separate from images directories.
- e. Metadata. Produce extracted metadata for each document in the form of a Concordance load file (.dat), including the following fields (where applicable): Bates range begin, Bates range end, Bates family range begin, Bates family range end, email subject line, document subject, file name, email sent date, email sent time, created date, created time, last modified date, last modified time, family date, family time, author, from, to, CC, BCC, custodian, source and/or source folder, file extension, file type, page count, MD5 hash value, and native file path location. Documents should be produced in such fashion as to identify the location of the document and, where applicable, the natural Person in whose possession it was found.

11. Each Request shall be construed according to its own terms, subject to these Definitions and Instructions, unless otherwise specified. Although some of the Requests may overlap with others, no Request should be read as limiting

any other.

12. If, in responding to these Requests, You claim any ambiguity in a Request, or in a Definition or Instruction applicable to a Request, such claim shall not be utilized as a basis for refusing to respond, but You shall set forth as part of Your response the language deemed to be ambiguous and the interpretation used in responding to the Request. Each Request is continuing in nature. If, after responding, You obtain or become aware of any additional Documents responsive to these Requests, You shall produce such additional Documents forthwith.

REQUESTS

1. All Documents You produced in the District Court Proceeding.
2. All pleadings and filings You filed in the District Court Proceeding.
3. Your initial disclosures in the District Court Proceeding.
4. All deposition records from the District Court Proceeding, including but not limited to, transcripts of each deposition, corresponding exhibits, video recordings and errata.
5. All declarations, affidavits or other sworn statements You made relating to the District Court Proceeding.
6. All expert reports You disclosed in the District Court Proceeding.
7. All Your responses and objections to written discovery in the District Court Proceeding, including requests for production, interrogatories and requests for admissions.

Dated: March 19, 2025

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Anthony J. LaRocca

Molly Bruder Fox

Sally Mordi

Lauren Goldschmidt

Steptoe LLP

1330 Connecticut Ave., NW

Washington, DC 20036

(202) 429-3000

Counsel for CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *CSXT's First Set of Requests for Production of Documents to Norfolk Southern Corporation & Norfolk Southern Railway Company* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Counsel for CSX Transportation, Inc.

March 19, 2025

Exhibit 4

CSXT's First Requests for Production to NPBL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836

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

**CSXT's First Set of Requests for Production of Documents
to Norfolk & Portsmouth Belt Line Railroad Company**

Pursuant to 49 C.F.R. § 1114.30, CSX Transportation, Inc. ("CSXT") hereby requests Norfolk & Portsmouth Belt Line Railroad Company ("NPBL") produce all documents responsive to the requests below (the "Requests," and each a "Request") to the offices of Steptoe LLP, 1330 Connecticut Avenue NW, Washington, DC 20036, or via electronic delivery means, in accordance with the Definitions and Instructions below and within 14 days or such other time as may be agreed upon by the parties or ordered by the Surface Transportation Board.

DEFINITIONS

The following Definitions apply to each Request contained herein and are deemed incorporated in each Request.

1. "Action" shall mean Norfolk Southern Corporation & Norfolk Southern Railway Company – Acquisition of Control – Norfolk & Portsmouth Beltline Railroad Company, FD 36836, filed before the Surface Transportation Board.

2. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.

3. "Any" shall be construed as "all" and vice versa, as necessary to bring within the scope of the Request all information that might otherwise be construed to be outside of its scope.

4. "CSX Transportation, Inc." or "CSXT" shall mean CSX Transportation, Inc., and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area

offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

5. “District Court Proceeding” shall mean *CSX Transportation, Inc. v. Norfolk Southern Railway Company*, No. 2:18-cv-00530 (E.D. Va. Oct. 4, 2018).

6. “Document” or “Documents” is used in the broadest possible sense permissible and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise) and drafts, whether printed or recorded (through a sound, video, or other electronic, magnetic, or digital recording system) or reproduced by hand, of the following: letters, correspondence, telegrams, telexes, memoranda, records, text messages, communications via Internet-connected application, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, “Post-It” or similar notes, stenographic notes, notes, notebooks, opinions or reports of financial advisors or consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, contracts, agreements, appraisals, analyses, purchase orders, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, photographs, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronic messages, voice mail messages, interoffice communications, advertising, packaging and promotional materials, material of any sort and in any format maintained or available at any time on the World Wide Web (whether formerly, currently, or both), and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to any information contained in any computer, even if not yet printed out.

7. “Including” shall mean “including, without limitation” and “including but not limited to.”

8. “Norfolk Southern” or “NS” shall mean Norfolk Southern Corporation, Norfolk Southern Railway Company and their predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

9. “NPBL” shall mean Norfolk & Portsmouth Belt Line Railroad Company and its predecessors and successors in interest, as well as the present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, area

offices, and regional offices of the foregoing companies; and all Persons acting or purporting to act on their behalf.

10. “Relating to” as used herein with reference to a subject shall mean both of the following:

- a. Containing, compromising, constituting, stating, setting forth, recording, contradicting, referring to, evidencing or in any way pertaining to, in whole or in part, that subject; and
- b. Describing, discussing, reflecting, interpreting, identifying, concerning, in any way pertaining to, in whole or in part, that subject, or to be in any way logically or factually connected with the matter discussed.

11. “You” and “Your” shall refer to NPBL as defined above.

12. The use of the singular shall be deemed to include the plural, as appropriate in context.

INSTRUCTIONS

The following Instructions apply to each Request set forth herein and are deemed incorporated in each Request:

1. In responding to these Requests, produce all Documents within the possession, custody, or control of NPBL, which includes in NPBL’s actual or constructive possession or control, including, without limitation, Documents, tangible things, and electronically stored information located in personal files, hard copy files, computer systems, smartphones, Internet-enabled messaging applications, networks, servers, CDs, DVDs, memory sticks, zip drives, hard drives, floppy disks, magnetic tapes, and other electronic media.

2. If there is no Document responsive to a particular Request, NPBL shall so state in writing.

3. If any Document or Communication called for by any Request is withheld because NPBL claims that it is privileged or otherwise protected from disclosure, NPBL must identify the Document or Communication so withheld and the privilege or doctrine NPBL claims. In the case of Documents of Communications that NPBL claims are privileged that relate to meetings or to other conversations, all participants in the meeting or conversation shall be identified.

4. Each Document requested herein must be produced in its entirety and without deletion, abbreviation, redaction (except for information that is both non-responsive and commercially sensitive), expurgation, or excisions, regardless

of whether NPBL considers the entire Document to be relevant or responsive to these Requests. If NPBL has redacted any portion of a Document for privilege, stamp the word “redacted” on each page of the Document which NPBL has redacted, identifying the basis for such redaction.

5. NPBL must produce entire Documents including all attachments, cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any produced Documents. Copies that differ in any respect from an original shall be produced separately.

6. If NPBL objects to any Request or part of a Request, set forth the basis for NPBL’s objection with particularity and respond to all parts of the Request to which NPBL does not object.

7. All responsive Documents in existence as of the date of production are to be produced. These Requests are continuing in nature, up to and during the course of any hearing. Any Documents created or obtained after the date of production are to be produced under NPBL’s obligation to supplement NPBL’s production immediately upon the creation or identification of additional responsive Documents.

8. For any responsive Documents that are no longer in existence, indicate the nature of the Document, its approximate date of creation, its author(s), and recipient(s), its approximate date of destruction or disposal, and the reason for and method by which its destruction or disposal took place.

9. All Documents responsive to these Requests shall be produced in accordance with any applicable rules and orders of the Surface Transportation Board, and subject to any agreement negotiated by and between the parties regarding the production of electronically stored information (“ESI”).

10. ESI should be produced in accordance with the following specifications:

- a. Form of Production. Produce electronically stored information in single-page TIFF format (Group IV TIFF at 300 dpi) with standard Concordance formatted load file (.dat), including all metadata. Name each TIFF file with a unique name matching the Bates number (or similar identifying mark) labeled on the corresponding page. Group every 1000 tiffs into a new folder; do not create a separate folder for each document.
- b. Image Load File. Provide an image load file (Opticon file) that contains document boundaries and page counts.
- c. Document Text. For documents that were originally stored as

native electronic files and which do not have redactions, produce the extracted full text (not OCR) from the body of each document in separate document-level *.txt files named for the beginning Bates number of the associated document. Provide OCR text for documents without extracted text available (non-searchable PDFs, etc.). Group 1000 document text files per incrementally named "TEXT" directories, separate from image directories. For documents that were originally stored as native electronic files and which have redactions, produce the OCR text from the redacted image(s) associated with each document, in separate document-level *.txt files named for the beginning Bates number of the associated document. Clearly label any redacted material to show the redactions on the TIFF image.

- d. Native Production For Certain File Types. For files that reasonably require viewing in their native format for a full understanding of their content and meaning (including but not limited to certain PowerPoint or other special presentation programs or database files), produce the files in native and TIFF formats to the extent it is reasonably possible to do so. Name the produced native file with the Bates number on the first page of the corresponding TIFF production of the file / document or on the TIFF placeholder document (i.e. "slipsheet"). For Excel files, produce in native format with a slip sheet that includes a Bates number and text indicating "This document was produced in Native format." Group native files within incrementally named "NATIVE" directories; separate from images directories.
- e. Metadata. Produce extracted metadata for each document in the form of a Concordance load file (.dat), including the following fields (where applicable): Bates range begin, Bates range end, Bates family range begin, Bates family range end, email subject line, document subject, file name, email sent date, email sent time, created date, created time, last modified date, last modified time, family date, family time, author, from, to, CC, BCC, custodian, source and/or source folder, file extension, file type, page count, MD5 hash value, and native file path location. Documents should be produced in such fashion as to identify the location of the document and, where applicable, the natural Person in whose possession it was found.

11. Each Request shall be construed according to its own terms, subject to these Definitions and Instructions, unless otherwise specified. Although some of the Requests may overlap with others, no Request should be read as limiting

any other.

12. If, in responding to these Requests, You claim any ambiguity in a Request, or in a Definition or Instruction applicable to a Request, such claim shall not be utilized as a basis for refusing to respond, but You shall set forth as part of Your response the language deemed to be ambiguous and the interpretation used in responding to the Request. Each Request is continuing in nature. If, after responding, You obtain or become aware of any additional Documents responsive to these Requests, You shall produce such additional Documents forthwith.

REQUESTS

1. All Documents You produced in the District Court Proceeding.
2. All pleadings and filings You filed in the District Court Proceeding.
3. Your initial disclosures in the District Court Proceeding.
4. All deposition records from the District Court Proceeding, including but not limited to, transcripts of each deposition, corresponding exhibits, video recordings and errata.
5. All declarations, affidavits or other sworn statements You made relating to the District Court Proceeding.
6. All expert reports You disclosed in the District Court Proceeding.
7. All Your responses and objections to written discovery in the District Court Proceeding, including requests for production, interrogatories and requests for admissions.

Dated: March 19, 2025

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Anthony J. LaRocca

Molly Bruder Fox

Sally Mordi

Lauren Goldschmidt

Steptoe LLP

1330 Connecticut Ave., NW

Washington, DC 20036

(202) 429-3000

Counsel for CSX Transportation, Inc

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *CSXT's First Set of Requests for Production of Documents to Norfolk & Portsmouth Belt Line Railroad Company* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
Counsel for CSX Transportation, Inc.

March 19, 2025

Exhibit 5

NS's Response to CSXT's First Requests for Production

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

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

**RESPONSE AND OBJECTION TO CSXT’S FIRST SET OF REQUEST
FOR PRODUCTION OF DOCUMENTS TO NORFOLK SOUTHERN CORPORATION
&NORFOLK SOUTHERN RAILWAY COMPANY**

**Joseph H. Carpenter
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Hanna M. Chouest
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Tel.: (202) 663-7823**

April 3, 2025

**Attorneys for Norfolk Southern
Corporation and Norfolk Southern Railway
Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

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

**RESPONSE AND OBJECTION TO CSXT’S FIRST SET OF REQUEST
FOR PRODUCTION OF DOCUMENTS TO NORFOLK SOUTHERN CORPORATION
&NORFOLK SOUTHERN RAILWAY COMPANY**

Pursuant to 49 C.F.R. 1114.21, Norfolk Southern Corporation and Norfolk Southern Railway Company (together, “Norfolk Southern”) hereby provide Objections to CSXT’s First Set of Requests for Production of Documents to Norfolk Southern Corporation & Norfolk Southern Railway Company (“Requests”), which was served on March 19, 2025.

GENERAL OBJECTIONS

Norfolk Southern’s General Objections, set forth herein, apply to each one of the CSXT’s Requests. Norfolk Southern’s General Objections shall not waive, limit, or prejudice any objections it may later assert. Norfolk Southern’s failure to object to a specific Request on a particular ground shall not be construed as a waiver of its right to object in the future on any other ground.

1. Norfolk Southern objects to the Requests, including the Instructions and Definitions, to the extent they impose burdens, obligations, or requirements that are greater than the

requirements or permissible scope of discovery under 49 C.F.R. Part 1114, Subpart B, or under other Surface Transportation Board (“Board”) rules or precedents.

2. Norfolk Southern objects to the Requests to the extent they seek identification of “all” or “any” documents, data, or a category of information where the production of a subset of documents, data, or information would be sufficient to respond to the Request, on the basis that such Requests are unduly burdensome.
3. Norfolk Southern objects to the Requests to the extent that they seek information or documents that constitute or disclose confidential or proprietary information, including third-party proprietary information, or other sensitive, non-public information that was produced in other courts of jurisdictions or other legal proceeding and are under confidentiality orders of that court or other legal proceeding.
4. Norfolk Southern objects to the Requests to the extent they seek documents, data, or information in a form not maintained by Norfolk Southern in the regular course of business or not available in the form requested by CSXT, where such documents, data, or information could be developed, if at all, only through the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and Norfolk Southern by its responses does not unless otherwise noted, undertake to prepare or produce any special studies. Any production by Norfolk Southern of information or documents in this category shall not be considered a waiver of this objection
5. Norfolk Southern objects to the Requests to the extent that they seek information protected from disclosure by the attorney-client privilege, attorney work product doctrine, any applicable common interest or joint defense privilege, or any other applicable

privilege, doctrine, statute, regulation, agreement, or protective order. If any such privileged, protected, or exempt information is unintentionally produced or provided, Norfolk Southern reserves all rights under applicable law to demand and/or require the return of all copies thereof and non-use by Norfolk Southern or any other person or entity in this or any other proceeding.

6. Norfolk Southern objects to the Requests, including the Instructions and Definitions, to the extent a particular Request, Definition, or Instruction is vague or ambiguous.
7. Norfolk Southern reserves the right to challenge the competency, relevance, materiality, or admissibility of, or to object on any ground to, the use of information requested in the Requests. To the extent that Norfolk Southern produces responsive information or Documents, Norfolk Southern does not concede that such information is relevant, material, or admissible into evidence, and any such production is not intended to waive any of Norfolk Southern's objections to any of the Requests.
8. Norfolk Southern objects to the Requests to the extent that they seek information relating to documents prepared, generated, or received in anticipation of or after the commencement of litigation.
9. Norfolk Southern objects to the Requests, including the Instructions and Definitions, to the extent they seek information that is already in CSXT's possession, custody, or control, or that is obtainable from publicly available sources, or from another source that is more convenient, less burdensome, or less expensive, including, without limitation, by other means of discovery.

10. Norfolk Southern objects to the Requests to the extent that they seek the production of documents prepared in connection with, or information relating to, possible settlement or mediation of this or any other proceeding.
11. Norfolk Southern's General Objections and responses are based upon information presently known to it. Norfolk Southern reserves the right to rely upon facts, Documents, or other evidence that it may develop or that may subsequently come to its attention; to assert additional objections and to supplement or amend these responses pursuant to 49 C.F.R. § 1114.29 at any time as this proceeding continues.
12. Norfolk Southern objects to the Requests to the extent they seek information protected from disclosure by confidentiality or nondisclosure agreements with third parties, as well as disclosure of non-public, financial, or otherwise confidential or commercially sensitive information.
13. Norfolk Southern objects to the Requests to the extent they seek information that Norfolk Southern is prohibited from disclosing under 49 U.S.C. § 11904.
14. By responding to the Requests, Norfolk Southern does not concede or adopt any misleading statement, misleading definition, inaccurate assumption, and/or mischaracterization of the facts or the position that Norfolk Southern has taken in this case contained in any Request.
15. Norfolk Southern objects to the Requests to the extent that they seek information or documents that are not in Norfolk Southern's possession, custody, or control, or otherwise kept by Norfolk Southern in the ordinary course of business.
16. Norfolk Southern objects to the Requests to the extent that the Requests are irrelevant, overly broad, unduly burdensome, untimely, and unlikely to lead to the discovery of

admissible evidence beyond the scope of Norfolk Southern's Significant Application, if and when it is filed.

17. Norfolk Southern objects to CSXT's definition of "Action" in Definition No. 1 as referring to a proceeding that is not yet filed.

18. Norfolk Southern objects to CSXT's definition of "Norfolk Southern," "you," "your," or "NS" means Norfolk Southern Railway Company and Norfolk Southern Corporation as overly broad, unduly burdensome, ambiguous and not reasonably calculated to lead to the discovery of admissible evidence to the extent that CSXT seeks to include (1) all Norfolk Southern affiliates and subsidiaries, (2) any joint venture to which they (an undefined term) are a party, and (3) employees, agents, officers, directors, representatives, consultants, accountants, and attorneys, who would neither have information that is relevant nor proportional to the needs of the proceeding, and would be unduly burdensome to produce.

19. Norfolk Southern objects to CSXT's definition of "NPBL" to mean Norfolk & Portsmouth Belt Line Railroad Company as overly broad, unduly burdensome, ambiguous and not reasonably calculated to lead to the discovery of admissible evidence including but not limited to with regard to privileged attorney-client communications and attorney work product, and as including predecessors and successors in interest, present and former directors, officers, employees, agents, managing agents, representatives, attorneys, predecessors, successors, parents, subsidiaries, affiliates, divisions, areas offices, and regional offices and all Persons acting or purporting to act on the behalf of the foregoing.

20. Norfolk Southern objects to CSXT's definition of "Relating to" with reference to a subject as ambiguous to the extent that it includes "compromising" the subject and to the extent that it would be "in any way logically or factually connected with the matter discussed." Norfolk Southern further objects to that definition to the extent that it is overly broad and unduly burdensome.

SPECIFIC OBJECTIONS

Norfolk Southern's Specific Objections, set forth herein, apply to each one of the CSXT's Requests and shall not waive, limit, or prejudice any objections it may later assert. Norfolk Southern's failure to object to a specific Request on a particular ground shall not be construed as a waiver of its right to object in the future on any other grounds.

1. Norfolk Southern objects to CSXT's definition of "Document" to the extent it is overly broad, unduly burdensome, and seeks information that is not proportional to the needs of the proceeding, including that it seeks production of documents other than final versions of responsive documents.
2. Norfolk Southern objects to CSXT's definition of "Relating to" to the extent it is overly broad, unduly burdensome, and seeks information that is outside the scope of this proceeding.
3. Norfolk Southern objects to CSXT's Instruction No. 3 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.
4. Norfolk Southern objects to CSXT's Instruction No. 4 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.

5. Norfolk Southern to CSXT's Instruction No. 5 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.
6. Norfolk Southern objects to CSXT's Instruction No. 6 to the extent that it seeks a response with regard to a Significant Application that has yet to be filed.
7. Norfolk Southern objects to CSXT's Instruction No. 7 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.
8. Norfolk Southern objects to CSXT's Instruction No. 8 as overbroad, unduly burdensome, seeks information not within the knowledge and awareness of Norfolk Southern, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.
9. NS objects to CSXT's Instructions Nos. 9 and 10 to the extent that the production of electronically stored information ("ESI") would subject NS to unreasonable and undue annoyance, burden, and expense. NS reserves the right to supplement this response and/or negotiate an ESI protocol at a later time as appropriate.
10. Norfolk Southern objects to CSXT's Instruction No. 12 as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence given the subject matter and temporal scope of the to-be-filed Significant Application.

RESPONSES AND OBJECTIONS TO REQUESTS

1. All Documents You produced in the District Court Proceeding.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 1 to the extent that the Request is overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

2. All pleadings and filings You filed in the District Court Proceeding.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 2 to the extent that the request is overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

3. Your initial disclosures in the District Court Proceeding.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 3 as overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

4. All deposition records from the District Court Proceeding, including but not limited to, transcripts of each deposition, corresponding exhibits, video recordings, and errata.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to

Request No. 4 as overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

5. All declarations, affidavits, or other sworn statements You made relating to the District Court Proceeding.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 5 as overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

6. All expert reports You disclosed in the District Court Proceeding.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 6 as overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

7. All Your responses and objections to written discovery in the District Court Proceeding, including requests for production, interrogatories and requests for admissions.

RESPONSE:

Subject to and without waiving the General Objections and Specific Objections set forth above, specifically General Objection No. 3 and Objection No. 5. Norfolk Southern objects to Request No. 7 as overly broad, unduly burdensome, untimely, and not reasonably calculated to lead to the discovery of relevant information.

Respectfully submitted,

/s/ William A. Mullins

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April 3, 2025

Attorneys for Norfolk Southern Corporation
and Norfolk Southern Railway Company

CERTIFICATE OF SERVICE

I certify that I have caused this 3rd day of April Norfolk Southern's Response to "CSXT's First Set of Request for Production of Documents" to be served upon counsel for CSXT and all other parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

/s/ William A. Mullins
William A. Mullins

Attorney for Norfolk Southern Corporation and
Norfolk Southern Railway Company