

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

THOMAS J. LITWILER
(312) 252-1508
tlitwiler@fletcher-sippel.com

309700

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Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

June 24, 2025

VIA ELECTRONIC FILING

PUBLIC VERSION

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: **Docket No. FD 36223**
Norfolk Southern Railway Company -- Petition to
Set Trackage Rights Compensation -- Norfolk and
Portsmouth Belt Line Railroad Company

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a public version of the **Reply of Norfolk and Portsmouth Belt Line Railroad Company to CSX Transportation, Inc.'s Motion to Dismiss or to Continue to Hold in Abeyance**, dated June 24, 2025.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler
Attorney for Norfolk and Portsmouth
Belt Line Railroad Company

TJL:tl

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36223

NORFOLK SOUTHERN RAILWAY COMPANY
-- PETITION TO SET TRACKAGE RIGHTS COMPENSATION --
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

**REPLY OF NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TO CSX TRANSPORTATION, INC.'S MOTION TO DISMISS
OR TO CONTINUE TO HOLD IN ABEYANCE**

Thomas J. Litwiler
Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

James L. Chapman, IV
W. Ryan Snow
Crenshaw, Ware & Martin, PLC
150 West Main Street, Suite 1923
Norfolk, Virginia 23510
(757) 623-3000

**ATTORNEYS FOR
NORFOLK AND PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Dated: June 24, 2025

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36223

NORFOLK SOUTHERN RAILWAY COMPANY
-- PETITION TO SET TRACKAGE RIGHTS COMPENSATION --
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

**REPLY OF NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TO CSX TRANSPORTATION, INC.'S MOTION TO DISMISS
OR TO CONTINUE TO HOLD IN ABEYANCE**

Respondent Norfolk and Portsmouth Belt Line Railroad Company ("NPBL") hereby replies to the motion of Intervenor CSX Transportation, Inc. ("CSXT") seeking to dismiss or continue to hold in abeyance this proceeding ("CSXT Motion"). NPBL supports the request by Norfolk Southern Railway Company ("NSR") to remove this case from abeyance, as the Board contemplated would occur once antitrust litigation in federal district court, including any appeals, was concluded. July 25, 2019 Decision at 2-3. The CSXT Motion does not provide any basis to proceed otherwise. Nearly seven (7) years after it was initiated, it is time for this matter to go forward.

BACKGROUND

The background of this matter is well-known to the Board. NPBL is a Class III switching and terminal railroad originally formed in 1896 and today jointly owned by NSR (57.143%) and CSXT (42.857%). NPBL provides neutral terminal switching services to customers and interchange partners in Norfolk, Portsmouth and Chesapeake, Virginia.

Since 1917, NPBL has possessed trackage rights over rail lines now owned by NSR extending from NS Junction in Chesapeake through Carolina Junction to West Junction in Norfolk, a distance of approximately 11 miles (the "NPBL Trackage Rights"). Those trackage rights form

a connection between the main body of NPBL's rail system at NS Junction and an otherwise isolated NPBL line that extends from West Junction into the Norfolk Intermodal Terminal ("NIT"). Besides providing access to NIT, the NPBL Trackage Rights also provide NPBL with access to other industries on NPBL's isolated line between West Junction and NIT, the ability to provide local service along the trackage rights route, and the right to interchange traffic with the Buckingham Branch Railroad at Coleman Place, an intermediate point on the trackage rights route. NPBL Reply to Petition to Set Trackage Rights Compensation, October 3, 2019, at 2, 7.¹

The 1917 trackage rights agreement was terminated effective July 31, 2016.² While NSR and NPBL thereafter were able to agree on many of the terms for a new agreement, the parties could not agree on compensation, and on September 13, 2018 NSR filed its petition requesting that the Board determine compensation terms. CSXT subsequently moved to intervene in the proceeding, a request which NPBL supported. By decision served March 29, 2019, the Board initiated a proceeding to set compensation for the NPBL Trackage Rights, and granted CSXT's petition to intervene. The Board explained that, consistent with its precedent, it would "establish compensation under the framework set forth in *SSW Compensation*."³ It rejected a contention by CSXT that something further was necessary before a compensation determination could proceed, explaining that "[c]ontrary to CSXT's suggestion, it is not necessary for the Board to approve or

¹ CSXT contends, without any supporting citation, that NPBL makes only "minimal" usage of the NPBL Trackage Rights. CSXT Motion at 3, 36. NPBL disagrees with that characterization.

² The 1917 agreement had a 99-year term, upon which it was terminable by either party by giving 12 months' written notice. NSR gave such notice on July 31, 2015.

³ *St. Louis Southwestern Ry. Co. – Trackage Rights Compensation*, 1 I.C.C.2d 776 (1984), modified, 4 I.C.C.2d 668 (1987).

exempt a new trackage rights agreement to establish its jurisdiction to set trackage rights compensation.” March 29, 2019 Decision at 5.⁴

The Board also explained the intended scope of CSXT’s participation in this proceeding:

The issue before the Board in this proceeding, while complicated, is narrow: the compensation for trackage rights held by NPBL for use of NSR’s Lines. CSXT may put forth evidence and arguments regarding its preferred calculation methodology that is relevant to establishing compensation under one of the *SSW Compensation* methodologies. While evidence relating solely to the issues in the pending federal court case will not be permitted, nothing in this decision limiting discovery to the framework set forth in *SSW Compensation* shall be construed to prohibit CSXT from arguing or submitting evidence that a particular *SSW Compensation* calculation methodology could have an anticompetitive effect.

March 29, 2019 Decision at 7.

CSXT subsequently filed a “Petition for Clarification or, if Necessary, Reconsideration, and Request to Hold Proceeding in Abeyance,” dated April 18, 2019. CSXT sought clarification or reconsideration on three specified issues, CSXT Abeyance Petition at 2-3, 7-16, none of which related to the Board’s finding that it had the authority to act on the compensation determination request or the Board’s rejection of CSXT’s suggestion that a new trackage rights approval or exemption was necessary before the Board had jurisdiction to set trackage rights compensation. CSXT also sought to hold the proceeding in abeyance pending the conclusion of the federal antitrust litigation then pending in Virginia district court. In a decision served July 25, 2019, the Board held the proceeding in abeyance, finding simply that “resolution

⁴ Citing *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 147-150 (1946) and *Toledo, Peoria & Western Railway Company – Trackage Rights Compensation – Peoria & Pekin Union Railway Company*, Docket No. FD 26476 (Sub-No. 1) (ICC served Sep. 20, 1994) (“TPW/P&PU”) at 1-2.

of the federal district court proceeding may reduce the number of disputed issues between the parties in this proceeding, thereby promoting efficiency.” July 25, 2019 Decision at 2. The Board did not grant CSXT’s petition for clarification or reconsideration, and did not alter any of the findings in its March 29, 2019 Decision. A petition for reconsideration filed by NSR with respect to the abeyance decision was subsequently denied on December 19, 2019.

Since that time, the district court antitrust litigation has concluded,⁵ and no fewer than five other STB proceedings involving some or all of the parties have been decided or are pending.⁶ While NPBL is the target entity and has made filings in the *NS-NPBL Control* proceeding, it is not an applicant in that case. NPBL also is not a party to the *CSXT v. NS* proceeding. CSXT now seeks to dismiss this trackage rights compensation proceeding, or in the alternative to hold this case in further abeyance until all of the other pending STB proceedings are concluded. NPBL opposes that request.

⁵ See *CSX Transp., Inc. v. Norfolk S. Ry. Co.*, 648 F. Supp. 3d 679 (E.D. Va. 2023), *aff’d*, 114 F.4th 280 (4th Cir. 2024), *cert. denied*, 2025 WL 1151230 (U.S., April 21, 2025).

⁶ *Norfolk Southern Railway Company – Petition for Declaratory Order*, Docket No. FD 36522 (STB served June 17, 2022), *aff’d sub nom. Norfolk S. Ry. Co. v. STB*, 72 F.4th 297 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1343 (2024); *Norfolk Southern Corporation and Norfolk Southern Railway Company – Acquisition of Control – Norfolk & Portsmouth Belt Line Railroad Company*, Docket No. FD 36836, Supplement and Perfection of Application filed June 13, 2025 (“*NS-NPBL Control*”); *CSX Transportation, Inc. – Terminal Trackage Rights – Norfolk Southern Railway Company and Norfolk & Portsmouth Belt Line Railroad Company*, Docket No. FD 36859, Application filed May 20, 2025; *CSX Transportation, Inc. v. Norfolk Southern Corporation and Norfolk Southern Railway Company*, Docket No. NOR 42183, Complaint filed May 20, 2025 (“*CSXT v. NS*”); *Norfolk Southern Railway Company – Discontinuance of Service Exemption – In Chesapeake, VA*, Docket No. AB-290 (Sub-No. 299X), *et al.*, Petition to Reject or Reopen and Revoke filed June 9, 2025.

DISCUSSION

A. There is No Basis for Dismissal of This Proceeding

CSXT makes a legal argument that this matter must be dismissed because the Board does not have the jurisdiction or authority to hear it. CSXT Motion at 30-34. CSXT apparently disputes the principle that “the STB has authority under the Supreme Court’s *Tex-Mex* decision to prescribe new trackage rights fees in cases where an existing agreement has been terminated,” CSXT Motion at 31 – a position CSXT might be unlikely to adopt in other contexts or situations. CSXT predicates its position largely and repeatedly on the notion that NSR has failed to seek new STB approval for any proposed trackage rights agreement between NSR and NPBL:

- “NS has completely ignored the statutory requirement that the Board find that any substantial change to an existing trackage rights agreement is consistent with the public interest. Indeed, *NSR has completely ignored the prior approval requirement altogether*. To be clear, NSR has not asked the STB for an exemption from the otherwise applicable prior-approval and authorization requirements set forth in 49 U.S.C. §§ 11323-25. NSR’s Petition merely assumes that such requirements do not apply here.” CSXT Motion at 32 (emphasis added).
- “On occasion, the Board has exercised its authority to prescribe trackage rights compensation for agreements that have already received Board approval under Sections 11323-25, therefore *obviating the need for a new regulatory examination of public interest considerations*.” CSXT Motion at 32 (emphasis added).
- “[N]either NSR nor NPBL has sought or obtained the required Board approval for such termination [of the 1917 agreement] or *the required Board approval for any new agreement*.” CSXT Motion at 33 (emphasis added).
- “[N]either NSR nor NPBL invoked that class exemption [49 C.F.R. § 1180.2(d)(7)] to obtain the required STB approval for a new trackage rights agreement.” CSXT Motion at 34.

- “NSR has neither provided any basis for invoking the STB’s fee prescription authority nor *sought any exemption from the regulatory scrutiny that the law requires to invoke that authority.*” CSXT Motion at 34 (emphasis added).

But this underpinning of CSXT’s legal argument has already been asked and answered in this proceeding: the Board specifically ruled more than six years ago that “[c]ontrary to CSXT’s suggestion, it is not necessary for the Board to approve or exempt a new trackage rights agreement to establish its jurisdiction to set trackage rights compensation.” March 29, 2019 Decision at 5. CSXT did not seek reconsideration of that holding at the time, and would be hard-pressed to do so now. That is the law of the case.

Some of CSXT’s arguments, such as in the second bullet point above, seem to imply that the Board’s authority to determine trackage rights compensation turns on whether the previously terminated trackage rights agreement was subject to agency approval when it was first executed. *Tex-Mex*, of course, definitively refutes any such contention:

[T]he fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1(18), are applicable to contracts made before as well as after its enactment. . . .

The authority of the Commission under § 5(2)(a) extends to fixing terms and conditions, including rentals for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. . . . It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired.

Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 144, 146-147 (1946).

It is notable that, in its long journey through various trackage rights compensation precedent, CSXT Motion at 31-33, CSXT makes no mention of the other decision cited by the Board in support of its rejection of CSXT's position in 2019: *TPW/P&PU*.⁷ The conclusion there was straightforward and definitive: "We must prescribe trackage rights compensation when the parties are unable to agree." *TPW/P&PU* at 1-2. That is equally true here, notwithstanding CSXT's repeating of previously-rejected arguments to the contrary.

B. This Proceeding Should Not Be Dismissed as a "Sham"

CSXT also argues that this proceeding is a "sham" – that NPBL "manufactured a 'disagreement'" with NSR over trackage rights fees "to attempt to use the STB to advance their longstanding anticompetitive scheme to exclude CSXT from access to NIT." CSXT Motion at 2, 21-25. CSXT has made these allegations before. *See NS-NPBL Control*, CSXT Petition to Reject Norfolk Southern's Minor Application, CSXT-1, Feb. 27, 2025, at 23-24. Here, as there, CSXT's mischaracterization is unfair, unwarranted and unsupported. Even a cursory review of NPBL's prior filings in this proceeding reveals that NPBL has engaged the Board's processes in good faith and in defense of its standalone interests. NPBL vigorously opposed NSR's original proposed procedural schedule, and contested NSR's approach for determining the applicable valuation methodology that would govern this proceeding. NPBL October 3, 2018 Reply to NSR Petition at 4-6. NPBL moved to strike material in NSR's Petition that NPBL believed was subject to attorney-client and other privileges. NPBL October 3, 2018 Motion to Strike; *see also* March 29, 2019 Decision at 8. NPBL corrected NSR's misidentification of the subject trackage rights as entirely overhead in nature. NPBL October 3, 2018 Reply at 2, n.2 and 7. NPBL pointed out that, despite NPBL's requests, NSR had provided no basis for the compensation it had sought from

⁷ *See supra*, note 4.

NPBL, which far exceeded recent STB determinations. NPBL October 3, 2018 Reply at 5, n.5. NPBL then supported CSXT’s intervention in this matter, which NS opposed. NPBL October 23, 2018 letter filing at 1.

Indeed, in arguing that the now-expired trackage rights terms must remain in place until and unless the Board sets new ones, CSXT Motion at 29 & n.16,⁸ CSXT is simply repeating an argument NPBL has made against NSR since the beginning of this proceeding. NPBL October 3, 2018 Reply at 6-7 (Board should not grant retroactive effect to compensation determinations unless the parties consent to retroactivity); *see also* NPBL September 3, 2019 Reply to NS Petition for Reconsideration, at 3-4. In this and a number of other substantive aspects, the interests of CSXT and NPBL in the merits of this trackage rights compensation proceeding are aligned. NPBL intends to vigorously pursue those interests, and to do so in a cooperative and complementary way with CSXT where appropriate. Against that backdrop, there simply is no basis to conclude or infer that this proceeding is a sham. Certainly there is no comparison between this case and the cases cited by CSXT where the Board revoked exemptions in order to prevent misuse of Board procedures and protect the integrity of the Board’s processes. CSXT Motion at 23-25 & n.13.

C. CSXT’s Motion is a Collateral Attack on SSW Compensation

Ultimately, CSXT contends that the very pendency of this trackage rights compensation proceeding, and the possibility that it could result in higher trackage rights fees than NPBL is paying today, threatens an “exclusionary increase in the trackage rights fee” such that “CSXT will be effectively excluded from access [to NIT] even by an independent, non-NSR controlled NPBL.” CSXT Motion at 25-26. But this is simply a collateral attack on the well-

⁸ *See also NS-NPBL Control*, CSXT Petition to Reject Norfolk Southern’s Minor Application, CSXT-1, Feb. 27, 2025, at 19, n.14.

accepted *SSW Compensation* principles for determining trackage rights fees in these types of circumstances. Those principles seek to ensure fair and reasonable trackage rights compensation that allows competitive rail service by the trackage rights holder. *See, e.g., Western Coal Traffic League v. STB*, 169 F.3d 775, 781 (D.C. Cir. 1999) (purpose of *SSW Compensation* is to “place a trackage rights tenant in the same position as a landlord”); *New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC*, Docket No. FD 35842 (STB served Oct. 31, 2017) at 8 (“[M]aintaining a fee far below the *SSW Compensation* level would have a negative impact on competitive parity”). NPBL intends to assure that the compensation determination reached by the Board in this case satisfies that objective. CSXT can be expected to do the same – and as an intervenor in this proceeding will have a full opportunity to do so.

D. NPBL Has Acted Reasonably to Protect Its Interests

CSXT also asserts that NPBL has unfairly “use[d] the pendency of this trackage rights compensation proceeding as a barrier to consideration of CSXT’s rate/service proposal [to NPBL for service to NIT], notwithstanding CSXT’s assurances that the proceeding did not undermine the commercial validity of CSXT’s proposal.” CSXT Motion at 27.⁹ But the CSXT Motion is replete with references to the significant relationship between the compensation that NPBL pays or will pay for use of the NPBL Trackage Rights and an NIT service offering by NPBL:

- “An increase in the trackage rights fee would raise the costs for NPBL to provide switching services to CSXT.” CSXT Motion at 2.
- “On October 8, 2018, CSXT filed a petition to intervene in this proceeding, given the critical nature of the NSR Lines [over which NPBL holds trackage rights] to any switching service that NPBL would provide CSXT to access NIT by rail.” CSXT Motion at 16.

⁹ CSXT acknowledges that NPBL has expressed a willingness to meet with CSXT to discuss the CSXT proposal. CSXT Motion at 27.

- NSR’s effort to increase NPBL’s trackage rights fees in this proceeding would “thereby raise NPBL’s costs for providing CSXT with switching services to NIT” CSXT Motion at 21-22.
- “NPBL must factor the trackage rights fee into any switching rate that it charges to CSXT” CSXT Motion at 25.
- “[A]n increase in the trackage rights fee would raise the costs for NPBL to provide switching services to CSXT at NIT” CSXT Motion at 25-26.

As these acknowledgements – combined with the open question of retroactivity of an STB compensation determination – demonstrate, NPBL has acted reasonably and prudently in proceeding carefully in its consideration of CSXT’s proposals for rail service to NIT that turn so heavily on the compensation that NPBL will be required to pay for using the NPBL Trackage Rights. CSXT claims that its proposals “fully protect[]” NPBL from retroactive trackage rights fees that might be imposed by the STB, CSXT Motion at 28-29 & n.16, but that is far from the case. CSXT might have been expected to warrant that, should higher trackage rights fees be adopted in the future and applied retroactively, CSXT would compensate NPBL for the difference between the trackage rights fee actually paid and the new retroactive trackage rights fee. But CSXT’s proposals have been neither that simple nor that definitive. Instead, CSXT initially proposed that if {

.} CSXT

Motion at 28. Later correspondence indicated amorphously that CSXT would {

} CSXT Motion at 29, n.16. NPBL’s

concern for protecting its interests in these circumstances is not unreasonable.

CSXT’s complaint that the “pendency” of this proceeding is unfairly precluding its competitive rail access to NIT rings hollow for another reason. But for the six-year delay

engendered by CSXT's 2019 request for abeyance, this proceeding would likely be concluded by now. Such delay was not an unforeseen consequence of CSXT's abeyance request.¹⁰ CSXT's current effort to dismiss this proceeding or, alternatively, continue to hold it in abeyance would simply extend the uncertainty about NPBL's trackage rights compensation further. It would instead seem that CSXT should want consideration of this matter to resume, so that the predicates for NPBL service to NIT for CSXT can be established and all parties will have available the information needed to adequately consider arrangements for such service.

E. Further Abeyance of This Proceeding Would Be Adverse to NPBL's Interests

CSXT may understandably have an NIT-centric view of the NPBL Trackage Rights compensation question, but as noted above NPBL uses those trackage rights for a number of other purposes as well.¹¹ While NPBL strongly believes and has consistently argued that any trackage rights compensation determination in this proceeding should not be applied retroactively, that remains an open question. As long as it does, NPBL faces the prospect of retroactive trackage rights fee increases that it would have to pay but would be unable to recoup through its switching fees or other means. CSXT's alternative request that, if not dismissed, this proceeding be held in further abeyance until the various other proceedings between the parties¹² are completed would simply increase NPBL's exposure in this regard. NPBL thus disagrees with CSXT that "continuing to hold this proceeding in abeyance would not be 'fundamentally unfair to any party.'" CSXT Motion at 35.

¹⁰ NPBL predicted as much at the time. NPBL Reply to NSR Petition for Reconsideration, September 3, 2019, at 1, n.1 (period of abeyance "is likely to be measured in years, rather than months.").

¹¹ *Supra*, at 2.

¹² *See* note 6, *supra*.

NPBL notes that its concerns in this regard would be to some degree assuaged if the Board were to determine now that the trackage rights compensation determination it will make in this proceeding will be applied prospectively. Absent that, however, NPBL opposes CSXT's alternative request to continue this matter in abeyance.¹³

WHEREFORE, NPBL respectfully requests that the CSXT Motion be denied, and that this matter be removed from abeyance.

Respectfully submitted,

/s/ Thomas J. Litwiler

By: _____

Thomas J. Litwiler
Robert A. Wimbish
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, Illinois 60606-3208
(312) 252-1500

James L. Chapman, IV
W. Ryan Snow
Crenshaw, Ware & Martin, PLC
150 West Main Street, Suite 1923
Norfolk, Virginia 23510
(757) 623-3000

**ATTORNEYS FOR
NORFOLK AND PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Dated: June 24, 2025

¹³ NPBL agrees with CSXT, however, that NSR's proposed procedural schedule is too expedited to assure adequate development of the record and consideration of the issues in this matter. See CSXT Motion at 36-37.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2025, a copy of the foregoing **Reply of Norfolk and Portsmouth Belt Line Railroad Company to CSX Transportation, Inc.’s Motion to Dismiss or to Continue to Hold in Abeyance** was served by electronic mail upon:

Peter W. Denton, Esq.
Anthony J. LaRocca, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
alarocca@steptoe.com
pdenton@steptoe.com

William A. Mullins, Esq.
Mullins Law Group PLLC
2001 L Street, N.W.
Suite 720
Washington, DC 20036
wmullins@mullinslawgroup.net

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler