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FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

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

ENTERED

Office of Chief Counsel

August 5, 2025

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Phone: (312) 252-1500

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

THOMAS J. LITWILER

(312) 252-1508

tlitwiler@fletcher-sippel.com

August 5, 2025

VIA ELECTRONIC FILING

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Case Administration Chief:

Attached for filing in the above-captioned proceeding is the **Reply of Norfolk and Portsmouth Belt Line Railroad Company to CSX Transportation, Inc.'s Motion to Compel the Appearance and Testimony of Cannon Moss** (NPBL-5), dated August 5, 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 36836

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

**REPLY OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TO CSX TRANSPORTATION, INC.'S MOTION TO COMPEL
THE APPEARANCE AND TESTIMONY OF CANNON MOSS**

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, P.L.C.
150 West Main Street, Suite 1923
Norfolk, Virginia 23510
(757) 623-3000

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

Dated: August 5, 2025

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36836

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

**REPLY OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TO CSX TRANSPORTATION, INC.'S MOTION TO COMPEL
THE APPEARANCE AND TESTIMONY OF CANNON MOSS**

Norfolk and Portsmouth Belt Line Railroad Company ("NPBL") hereby replies to the motion (CSXT-14) of CSX Transportation, Inc. ("CSXT") to compel the deposition of Cannon Moss, NPBL's President and General Manager. Given NPBL's posture in this proceeding, the significant discovery responses that NPBL has already provided to CSXT, and the availability of extensive, prior deposition testimony of Mr. Moss in federal district court litigation involving the parties,¹ there is not a need or basis for Mr. Moss' deposition in this proceeding. The CSXT-14 Motion should be denied.

This proceeding was initiated on February 14, 2025, when Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") filed a Minor Application seeking authority from the Board to control NPBL. NPBL is not an applicant in this matter, had no role in the preparation of the Application, and did not provide a statement or testimony (from Mr. Moss or any other NPBL personnel) in support of the Application. Indeed,

¹ *CSX Transportation, Inc. v. Norfolk Southern Railway Company and Norfolk & Portsmouth Belt Line Railroad Company*, Civil No. 2:18cv530 (E.D. Va.) (the "District Court Proceeding").

NPBL was not served with the Application, and did not become aware of its existence until after it had been filed and posted on the Board's website.

Since that time, NPBL's substantive participation in this proceeding has been limited to a single, 3-page filing that sought simply to address CSXT's mischaracterization of another Board proceeding in which NPBL is a party. See NPBL-1, filed March 10, 2025 (explicitly taking no position on NS's Application or CSXT's petition to reject the Application, and responding solely to CSXT's allegation that the proceeding in Docket No. FD 36223, *Norfolk Southern Railway Company – Petition to Set Trackage Rights Compensation – Norfolk and Portsmouth Belt Line Railroad Company* was a sham). NPBL did not file a notice of intent to participate in this proceeding on July 23, 2025, as provided for in Decision No. 7.

NPBL has, nonetheless, voluntarily responded to significant discovery requests propounded on it by CSXT. NPBL was served with a total of 62 document production requests in three sets of requests² and a small number of interrogatories. In response, NPBL produced some 1,500 pages of documents. CSXT has followed-up with respect to a small number NPBL's responses, and NPBL is in the process of addressing those matters.

The discovery record from the District Court Proceeding – which CSXT is able to utilize in this proceeding, see note 2, *supra* – includes the transcript of the February 14, 2020 deposition of Mr. Moss by CSXT. That deposition lasted for seven and a half hours, and produced a 294-page transcript with 43 marked exhibits. CSXT has successfully argued – and the Board found in Decision No. 8 – that the issues in the District Court Proceeding are directly relevant to the Board's consideration of NS's Application in this proceeding.

² A fourth CSXT request for production of documents to NPBL was mooted by Decision No. 8 and NPBL's consent to CSXT's use in this proceeding of the discovery record from the District Court Proceeding. See CSXT-14, Exhibit 3.

It is against this backdrop that CSXT now seeks again to depose Mr. Moss. CSXT's notice of deposition for Mr. Moss (CSXT-14, Exhibit 2) as well as the CSXT-14 Motion broadly indicate that CSXT wishes to question Mr. Moss about communications that have already been produced by NPBL, including communications between Mr. Moss and CSXT employees. It also wants to question Mr. Moss about CSXT's 2024 "Rate and Service Proposal" and "Governance Proposal," and, somewhat amorphously, explore "information about the NPBL Board of Directors." CSXT-14 at 2.

It is not clear why Mr. Moss' deposition is needed to address any of these matters. This is not a case where NPBL is a stranger to CSXT. CSXT has a significant ownership stake in NPBL, and has two representatives who sit on NPBL's Board of Directors. Obviously, correspondence, materials and conversations arising in connection with NPBL Board of Directors matters are known and available to CSXT. CSXT's 2024 rate, service and governance proposals parallel similar proposals that CSXT made in 2018 and earlier and that were addressed extensively in CSXT's 2020 deposition of Mr. Moss. The 2024 proposals were tabled by NPBL's Board of Directors at a meeting at which CSXT was present. And there is no reason why the various communications already produced to CSXT by NPBL in discovery in this proceeding do not speak for themselves.

The Board's service list for Docket No. FD 36836 shows counsel for NPBL as a "party of record," presumably as a result of the NPBL-1 filing referenced above. But simply submitting a filing in a docket does not automatically make the filer a party. *See Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company*, Docket No. FD 36496 (STB served Jan. 28, 2022) at 3 (granting intervention to an entity that had previously submitting filings in the proceeding).

Indeed, the Board's specified procedures for intervention would be largely meaningless if that was the case. 49 C.F.R. § 1113.7(f) ("If leave is granted the petitioner becomes an intervener and a party to the proceeding."); *see also* 49 C.F.R. § 1112.4. NPBL has never sought intervention as a party in this proceeding. And as indicated above, NPBL did not file a notice of intent to participate in response to Decision No. 7, which required such notices to be filed by July 23, 2025.

Given NPBL's minimal participation here – none of it on the merits of the NS Application or the statutory issues before the Board – its posture is more akin to a non-party, as even CSXT appears to realize. CSXT-14 at 3. And as both the case cited by CSXT and other cases demonstrate, instances where the Board has compelled non-party depositions or other discovery generally involve entities that have provided some form of support for the applicants in the subject proceeding. *Ballard Terminal Railroad Company, L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731 (STB served May 17, 2013) at 3 (ordering non-party deposition where the non-party had authored a support statement that was included as an exhibit to the applicant's petition); *East West Resort Transportation, LLC, et al. – Petition for Declaratory Order – Motor Carrier Transportation of Passengers in Colorado*, Docket No. MD-F-21008 (STB served June 1, 2005) at 2 (subpoena issued for non-party depositions where the non-parties had provided verified statements that were included in the applicant's petition). That is not the case here.

The Board has noted that "depositions are seldom used in preparation for litigation before the Board." *Expedited Procedures for Processing Rail Rate*, 1 S.T.B. 754, 767 (1996), *aff'd sub nom. United Transp. Union – Ill. Legis. Bd. v. STB*, 132 F.3d 71 (D.C. Cir. 1998). The totality of the circumstances here – NPBL's nominal participant status, the extensive document production it has already voluntarily provided to CSXT, and a nearly three-hundred-page long

deposition transcript addressing the issues that CSXT believes are relevant here – indicate that this is not an appropriate instance to engage in that seldom-used form of discovery.

Nonetheless, if the Board concludes that CSXT should be permitted to depose Mr. Moss, such a deposition should be on particularized topics and for a period of no more than two hours.³ CSXT should be held to its representation that questioning will be limited to the period after 2020 and to communications that have been produced in discovery by NPBL. CSXT-14 at 4. To the extent that such constraints are appropriately the subject of a protective order, 49 C.F.R. § 1114.21(c), the Board should enter such an order in connection with any decision granting CSXT’s motion.⁴

³ CSXT’s notice of deposition for Mr. Moss indicated that the deposition would occur in Washington, D.C., unless otherwise mutually agreed. CSXT-14, Exhibit 2. 49 C.F.R. § 1114.23(a) provides that “depositions should be taken in the city or municipality where the deponent is located” – which in this instance would be Norfolk, Virginia.

⁴ As the CSXT motion reflects, NPBL had indicated to CSXT that NPBL intended to file a motion for protective order with respect to the notice of Mr. Moss’ deposition. CSXT-14 at 3 and Exhibit 3. The intervening submission of CSXT’s motion to compel has resulted instead in the filing of this reply by NPBL.

WHEREFORE, NPBL respectfully requests that the CSXT-14 motion to compel be denied.

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, P.L.C.

150 West Main Street, Suite 1923

Norfolk, Virginia 23510

(757) 623-3000

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

Dated: August 5, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2025, a copy of the foregoing **Reply of Norfolk and Portsmouth Belt Line Railroad Company to CSX Transportation, Inc.’s Motion to Compel the Appearance and Testimony of Cannon Moss** (NPBL-5) was served by electronic or first-class mail, postage prepaid, upon:

Peter W. Denton
Sally Mordi
Steptoe LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
pdenton@steptoe.com
smordi@steptoe.com

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

Sarah J. McCoy
General Counsel & Chief Administrative Officer
Virginia Port Authority
101 West Main Street
Norfolk, VA 23510
smccoy@portofvirginia.com

Secretary of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
U.S. Department of Justice
Washington, DC 20530

/s/ Thomas J. Litwiler

Thomas J. Litwiler