

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

310668

ENTERED
Office of Chief Counsel
January 6, 2026
Part of
Public Record

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

January 6, 2026

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 (Sub-No. 1)**
CSX Transportation, Inc. – Terminal Trackage Rights –
Norfolk Southern Railway Company and
Norfolk and Portsmouth Belt Line Railroad Company

Dear Case Administration Chief:

Attached for filing in the above-captioned proceeding is the **Motion to Strike of Norfolk and Portsmouth Belt Line Railroad Company (NPBL-9)**, dated January 6, 2026.

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
Hon. Jenifer Soulikias, ALJ

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36836 (SUB-NO. 1)

CSX TRANSPORTATION, INC.
-- TERMINAL TRACKAGE RIGHTS --
NORFOLK SOUTHERN RAILWAY COMPANY AND
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

**MOTION TO STRIKE OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

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: January 6, 2026

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36836 (SUB-NO. 1)

CSX TRANSPORTATION, INC.
-- TERMINAL TRACKAGE RIGHTS --
NORFOLK SOUTHERN RAILWAY COMPANY AND
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

**MOTION TO STRIKE OF
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY**

Norfolk and Portsmouth Belt Line Railroad Company (“NPBL”) hereby requests that the Board strike portions of the Verified Statement of Mark Mayo and the corresponding sections of the Rebuttal (CSXT-26) filed by CSX Transportation, Inc. (“CSXT”) in support of its responsive application seeking terminal trackage rights in this proceeding. Despite bearing the burden of proof to show that its proposed terminal trackage rights over NPBL would be practicable without substantially impairing NPBL’s own operations, CSXT waited until its rebuttal filing to proffer any operating witness to provide any factual evidence with respect to the operational feasibility and interference factors of 49 U.S.C. § 11102(a). CSXT was necessarily aware when it filed its responsive application that such matters would be a central element of its request for terminal trackage rights relief, and its tardy factual submission regarding those subjects unfairly deprives NPBL of an opportunity to respond. Those elements of the CSXT-26 Rebuttal and Mr. Mayo’s verified statement should be stricken.

CSXT filed its responsive Application for Terminal Trackage Rights (CSXT-23) on September 18, 2025, seeking certain trackage rights over lines of NPBL and Norfolk Southern Railway Company (“NSR”) as conditions to the request by NSR’s parent to obtain control authority for NPBL in underlying Docket No. FD 36836. CSXT’s responsive application is

governed by 49 U.S.C. § 11102(a), which provides among other things that terminal trackage rights can only be granted upon a showing that such use would be “practicable . . . without substantially impairing the ability of the [landlord] rail carrier . . . to handle its own business.” As the responsive applicant, CSXT undeniably bears the burden of proof on that issue.¹

Nonetheless, the CSXT responsive application provided virtually no facts or evidence on operational capacity and interference matters or considerations that would be implicated by its proposed terminal trackage rights. There was no CSXT operating witness who provided evidence or opinions regarding the feasibility of the two-mile-long train operations that CSXT proposed to conduct on NPBL’s track.² There was no attempt to consider the capacity and speed limits of the subject NPBL line between Seaboard Junction and NS Junction, or NPBL’s current use of that line, or the impact of drawbridge-related delays on the line, or a host of other relevant operational matters. NPBL had previously and consistently raised these concerns with CSXT,³ so CSXT was well aware that issues existed with respect to the statutory criteria addressing practicability and substantial impairment.

¹ See, e.g., *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation*, Docket No. FD 33388, Decision No. 30 (STB served Sep. 11, 1997), slip op. at 3 (even where a responsive application is considered “minor,” the “burden of proof is still on petitioners to submit sufficient evidence to justify a grant of their respective responsive applications.”); *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 182 (1986) (burden of proof rests on party seeking terminal trackage rights), *aff’d sub nom. Midtec Paper Corp. v. U.S.*, 857 F.2d 1487 (D.C. Cir. 1988).

² The only witness testimony of any kind in CSXT’s responsive application was a cross-reference to a verified statement of a CSXT sales and marketing officer that was included in the separate Opposition filing that CSXT concurrently submitted in the NS-NPBL control case. CSXT-23 at 19.

³ NPBL’s Cannon Moss had sought to address these operational issues and disruptions associated with the potential movement of CSXT intermodal trains with CSXT for years, to no

CSXT's stance in its terminal trackage rights application was consistent with its approach to prior discussions with NPBL regarding proposals to move CSXT intermodal trains over NPBL to the Port of Virginia's Norfolk International Terminals ("NIT"). In those discussions, NPBL "repeatedly raised necessary questions with CSXT about train length, operating cadence, route complexity, and dispatching protocols" and sought to meet with CSXT local operations team members to "examine, and possibly address, the operational challenges associated with CSXT's proposed NIT route." NPBL-6, Moss V.S. at 8. CSXT's responsive application was not forthcoming with respect to such matters.

In lieu of providing any evidence on actual rail capacity, operational patterns and potential interference, CSXT's responsive application made two blanket legal arguments regarding the practicability and substantial impairment standards of 49 U.S.C. § 11102(a). First, it suggested that because CSXT intermodal traffic to NIT could be moving in interchange over NPBL today, its proposed trackage rights would simply substitute one kind of traffic on NPBL's line for another. CSXT-23 at 14. Second, CSXT sought to rely on agency precedent that terminal trackage rights are not impracticable simply because they may make operations "slightly more complicated" and would "require coordination of operations between the parties." CSXT-23 at 13-14 (citations omitted). These were the sole bases on which CSXT claimed its terminal trackage rights proposal satisfied the relevant operational criteria of the statute.

CSXT later reiterated its position in response to an NS motion to summarily reject the terminal trackage rights application.⁴ It asserted that "[d]etailed operational data is not needed

avail. NPBL Reply to Application for Terminal Trackage Rights, November 20, 2025 (NPBL-6), Verified Statement of R. Cannon Moss ("Moss V.S.") at 8-9.

⁴ See NS Motion to Summarily Reject CSXT's Responsive Application for Terminal Trackage Rights, November 13, 2025 (NS-29) and CSXT Reply to NS's Motion to Summarily Reject Responsive Application for Terminal Trackage Rights, December 3, 2025 (CSXT-32).

to make the required practicability findings under the relevant statute,” that the “statute does not require submission of an operating plan,” and that the “Board does not need to consider the precise operational details regarding the requested terminal trackage rights now.” CSXT-32 at 9-10. CSXT instead stood on its two legal arguments as justifying its responsive application. *Id.*

Having disclaimed any need to provide specific operational data to satisfy its statutory burden of proof, CSXT’s rebuttal filing then introduced, for the first time, exactly such information. That CSXT rebuttal included a verified statement from a new witness – Mark Mayo, the General Manager for CSXT’s Southeast Region and the first operating witness of any kind to appear for CSXT in support of its responsive terminal trackage rights application. According to CSXT, “Mr. Mayo explains that if NIT has sufficient capacity to accept the traffic, NS and NPBL have sufficient capacity to accommodate CSXT’s proposal of one additional train per day to and from NIT.” CSXT-36 at 6. For his part, after introducing a variety of factual operational claims, Mr. Mayo summarized that “I am confident that CSXT can operate its intermodal train to NIT without causing logistical disruptions to NS or NPBL operations.” CSXT-36 at 61 (Mayo V.S. at 9). This was, of course, exactly the statutory threshold demonstration that CSXT was required to address in its application, but did not.

The Board recently addressed the proper scope of rebuttal in a terminal trackage rights proceeding.⁵ The Board found there that “Metra’s submission of affirmative evidence on what Metra believes is a reasonable rate – which occurred after UP’s reply submission – is improper rebuttal to which UP had no ability to respond.”⁶ The operative test is whether the party

⁵ *Commuter Rail Division of the Regional Transportation Authority d/b/a Metra – Terminal Trackage Rights – Union Pacific Railroad Company*, Docket No. FD 36844 (STB served Sep. 3, 2025) (“*Metra/UP*”), slip op. at 11-13.

⁶ *Metra/UP*, slip op. at 12.

“could not have anticipated new arguments presented in opponent’s reply.”⁷ Here, of course, the operational and interference issues that CSXT attempts to address for the first time on rebuttal go to the heart of its burden of proof under 49 U.S.C. § 11102(a) and were well-known to CSXT at the time it filed its terminal trackage rights application. Withholding such evidence until rebuttal deprived NPBL of any ability to respond to what are key elements of CSXT’s case-in-chief.⁸

The Board has recently adopted a stricter stance on the enforcement of the prohibition on replies to replies in 49 C.F.R. § 1104.13(c) – a stance that presumably extends to the filing of surrebuttals to rebuttals.⁹ NPBL honors that stance here. Particularly in cases such as this one, where the applicant has the right to file rebuttal, the Board should be especially diligent in assuring that a respondent party is not sandbagged by evidence and argument that the applicant chooses to withhold until the rebuttal phase. Here, CSXT introduced an entirely new witness on rebuttal, addressing matters on which CSXT bears the burden of proof and which CSXT intentionally elected not to address in its responsive application. Because NPBL cannot respond to that evidence and argument, the Board has no basis to analyze and judge its credibility. This is

⁷ *Lake Providence Port Commission – Feeder Line Application – Line of Delta Southern Railroad Located in East Carroll and Madison Parishes, La.*, Docket No. FD 36447 (STB served Sep. 25, 2025), slip op. at 6 & n.12 (summarizing *Metra/UP*); *see also, e.g., Duke Energy Corp. v. Norfolk Southern Ry. Co.*, 7 S.T.B. 89, 100 (2003) (reminding parties that “the party with the burden of proof . . . must present its full case-in-chief in its opening evidence” and “caution[ing] parties about the consequences of new evidence being improperly submitted on rebuttal.” (citations omitted)); *Consumers Energy Company v. CSX Transportation, Inc.*, Docket No. NOR 42142 (STB served Dec. 9, 2016), slip op. at 3 (rebuttal may not be used “as an opportunity to introduce new evidence that could and should have been submitted on opening.” (citation omitted)).

⁸ The presentation of such evidence only on rebuttal also, for example, deprived NPBL of any effective opportunity to depose CSXT’s new operating witness.

⁹ *See Sunflower State Industrial Railway, LLC – Petition for Declaratory Order*, Docket No. FD 36714 (Sub-No. 1) (STB served Mar. 28, 2025), slip op. at 2 n.3.

particularly problematic in this case, where the factual assertions in Mr. Mayo's verified statement are often incorrect or incomplete.¹⁰ Such rebuttal evidence and argument must be stricken.

WHEREFORE, NPBL respectfully requests that the Board strike pages 6 through 10 of Mr. Mayo's verified statement (CSXT-36 at 58-62), as well as the related argument in the CSXT-36 Rebuttal filing.

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: January 6, 2026

¹⁰ Mr. Mayo's claim, for example, that NPBL does not operate at night is categorically incorrect. CSXT-36 at 61 (Mayo V.S. at 9). And his brand-new suggestion that NPBL implement a track warrant system would require NPBL to adopt a different operational model, fundamentally altering established operating, inspection and maintenance practices. CSXT-36 at 61-62 (Mayo V.S. at 9-10). It would entail, for example, adding personnel such as around-the-clock dispatchers, which NPBL does not currently have. This collection of hypothetical solutions – advanced late in the case – assumes NPBL can simply reconfigure its railroad to suit CSXT's needs. Ultimately, CSXT is not responding to arguments raised by NPBL so much as inventing new operational theories to fill gaps in its original application.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2026, a copy of the foregoing **Motion to Strike of Norfolk and Portsmouth Belt Line Railroad Company** (NPBL-9) 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
John V. Edwards
Crystal M. Zorbaugh
Mullins Law Group PLLC
2001 L Street, N.W., Suite 720
Washington, DC 20036
wmullins@mullinslawgroup.net
jedwards@mullinslawgroup.net
czorbaugh@mullinslawgroup.net

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

Kathleen L. Wright
Gentry Locke
P.O. Box 40013
Roanoke, VA 24022-0013
wright@gentrylocke.com

Noah P. Sullivan
Gentry Locke
919 East Main Street
Suite 1130
Richmond, VA 23219
nsullivan@gentrylocke.com

Abigail Slater
U.S. Department of Justice
Antitrust Division
450 Firth Street, N.W.
Suite 8010
Washington, DC 20530
don.amlin@usdoj.gov

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

/s/ *Thomas J. Litwiler*

Thomas J. Litwiler