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October 3, 2018

246455

VIA ELECTRONIC FILING

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

ENTERED
Office of Proceedings
October 3, 2018
Part of
Public Record

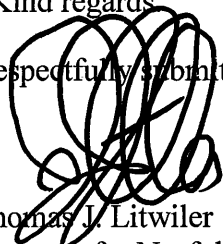
Re: **Docket No. FD 36223**
Norfolk Southern Railway Company -- Petition to
Set Trackage Rights Compensation -- Norfolk and
Portsmouth Belt Line Railroad Company

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding are the **Reply of Norfolk and Portsmouth Belt Line Railroad Company to Petition to Set Trackage Rights Compensation** and the **Motion to Strike of Norfolk and Portsmouth Belt Line Railroad Company**, both dated October 3, 2018.

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

Respectfully submitted,


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

TJL:tl

Attachments

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

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

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Norfolk, Virginia 23510
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**ATTORNEYS FOR
NORFOLK AND PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Dated: October 3, 2018

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36223

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

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

Pursuant to 49 C.F.R. § 1104.8, Norfolk and Portsmouth Belt Line Railroad Company ("NPBL") hereby moves to strike Exhibit C to the Petition of Norfolk Southern Railway Company ("NS") filed in this docket on September 13, 2018. Exhibit C is an internal corporate communication from NPBL's president to NPBL's board of directors, subject to a fiduciary duty of confidentiality and attorney-client privilege. Its inclusion as an attachment to NS's petition was inappropriate.

BACKGROUND

NPBL is a Virginia corporation and a Class III switching and terminal rail carrier in the Hampton Roads area of Virginia. Its stock is held by NS (57.143%) and CSX Transportation, Inc. ("CSXT" - 42.857%). NPBL has a board of directors consisting of six voting members: three are appointed by NS; two are appointed by CSXT; and together those five directors select NPBL's president/general manager, who also serves as NPBL's sixth voting director. Cannon Moss is currently NPBL's president and general manager.

In an internal August 27, 2018 e-mail correspondence to the NPBL board of directors, Mr. Moss addressed the status of the matter which is now the subject of this

administrative proceeding between NS and NPBL. The five addressees on the correspondence are the three NS-designated members and two CSXT-designated members of NPBL's board of directors. The correspondence was copied to Donna N. Coleman, NPBL's Vice President, Corporate Secretary and Comptroller, and to James L. Chapman, IV, Esq., NPBL's general counsel.¹ No other individual was copied on the correspondence, and NPBL has not provided it to any other party. The correspondence was subsequently included as Exhibit C to NS's September 13, 2018 petition in this matter.

DISCUSSION

The August 27, 2018 correspondence that NS has obtained and provided to the Board was an internal communication to NPBL's board of directors and general counsel, received subject to the directors' fiduciary duty of confidentiality and the attorney-client privilege. The correspondence updated directors on important negotiations between the corporation and a shareholder, and addresses matters of legal strategy. That the correspondence was intended solely for NPBL's directors, and solely in their role as NPBL directors, is clear from the language used: if there were any questions, NPBL could "schedule a board meeting," or an update could be provided "at the next regular board meeting in December." NS Petition, Exhibit C.

Virginia law, both in statute and its recognition of the common law, requires corporate directors to respectively act "in the best interests of the corporation" (per the statute) and with a duty of loyalty (per the common law). Va. Code § 13.1-690; *Willard v. Moneta Bldg. Supply, Inc.* 258 Va. 140, 151, 515 S.E.2d 277, 284 (1999). The common law duty of loyalty

¹ Mr. Moss and Ms. Coleman are NPBL employees; the "nscorp.com" suffixes in their e-mail addresses reflect an information technology services arrangement with NS. Those individuals are not employees, officers or directors of NS or Norfolk Southern Corporation.

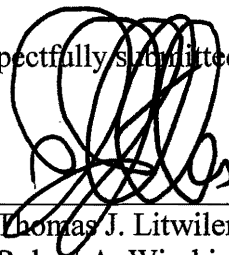
includes an obligation to maintain the confidentiality of sensitive company information. *Hollinger Int'l Inc. v. Black*, 844 A.2d 1022, 1061-1062 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005). That duty is not diminished simply because a recipient of such information may be a shareholder of the corporation, or has appointed the director.

The August 27, 2018 correspondence also was subject to the attorney-client privilege and its ensuing confidences. "Confidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney's employment are privileged from disclosure, even for the purpose of administering justice." *Banks v. Mario Indus. of Va., Inc*, 274 Va. 438, 453, 650 S.E.2d 687, 695 (2007). Here, the correspondence was copied to NPBL's general counsel and discusses legal aspects of the instant dispute.

However NS came into possession of the August 27, 2018 correspondence, its inclusion in the record in this proceeding is plainly inappropriate. Confidential or privileged information placed before the Board is objectionable material that is properly remediated by a motion to strike under 49 C.F.R. § 1104.8. *Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Company -- Control -- Illinois Central Corporation, et al.*, Docket No. FD 33556 (STB served Oct. 16, 1998) at 6, n. 23. The Board should not ratify even inadvertent disclosures that are inconsistent with the fiduciary duty of confidentiality and the attorney-client privilege by allowing such materials to remain of record.

WHEREFORE, NPBL respectfully requests that the Board strike Exhibit C to the NS Petition pursuant to 49 C.F.R. § 1104.8.

Respectfully submitted,

By: 

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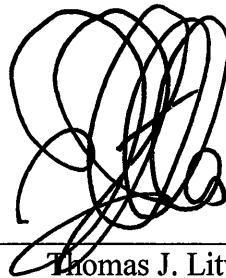
Dated: October 3, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2018, a copy of the foregoing **Motion to Strike of Norfolk and Portsmouth Belt Line Railroad Company** was served by electronic mail and first-class mail, postage prepaid, upon:

William A. Mullins, Esq.
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A handwritten signature in black ink, appearing to read 'Thomas J. Litwiler', is written over a horizontal line.

Thomas J. Litwiler