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October 23, 2018

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 36223
Norfolk Southern Railway Company – Petition To Set Trackage
Rights Compensation – Norfolk & Portsmouth Belt Line Railroad
Company

Dear Ms. Brown:

Enclosed is the reply of Norfolk Southern Railway Company (“NSR”) to the October 3, 2018 motion to strike and mediation request filed by Norfolk & Portsmouth Belt Line Railroad in this proceeding. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36223

**NORFOLK SOUTHERN RAILWAY COMPANY
– PETITION TO SET TRACKAGE RIGHTS COMPENSATION –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

REPLY TO MOTION TO STRIKE AND MEDIATION REQUEST

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**Attorneys for Norfolk Southern Railway
Company**

Dated: October 23, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36223

**NORFOLK SOUTHERN RAILWAY COMPANY
– PETITION TO SET TRackage RIGHTS COMPENSATION –
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

On September 13, 2018, Norfolk Southern Railway Company (“NSR”) filed a petition to set the level of trackage rights compensation to govern the trackage rights that Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”) operates over NSR’s tracks located in Norfolk, VA and Chesapeake, VA. By reply filed on October 3 (“NPBL Reply”), NPBL agreed that “initiation of a Board proceeding to resolve the compensation question is appropriate.” NPBL Reply at 3. Accordingly, there is agreement among NPBL and NSR that a proceeding to set compensation should be instituted by the Board.

Where there is disagreement is with respect to the proposed schedule to resolve the compensation issue. The NPBL Reply took issue with NSR’s proposed procedural and discovery schedule and suggested mediation. In a concurrent related filing, NPBL also moved to strike NSR’s Exhibit C, which was an email confirming that NPBL and NSR had reached agreement on all issues in the proposed trackage rights agreement except for the trackage rights compensation amount. NSR hereby replies to the motion to strike, NPBL’s mediation request, and NPBL’s procedural concerns.

A. Motion To Strike

On the motion to strike, there is no reason for the Board to act upon that motion because NSR voluntarily withdraws Exhibit C filed September 13 and hereby substitutes a revised Exhibit C. NSR does not agree that Exhibit C filed on September 13 violated the confidentiality requirements of Virginia corporate and common law to maintain the confidentiality of sensitive company information. The email simply confirmed that the parties were in agreement on the trackage rights terms and that the compensation issue should be submitted to the STB. This is not sensitive company information nor was its disclosure inconsistent with NPBL's interest. Indeed, as discussed below, NPBL previously had communicated that information directly to NSR.

NSR also does not agree that the email was an attorney/client communication protected by the attorney/client privilege. It was an email from the President and General Manager of NPBL to the Board members, not from legal counsel providing legal advice. Nonetheless, even if it were a privileged attorney/client communication, such privilege can be waived by any party to the communication.

Nonetheless, NSR hereby withdraws the email filed September 13 and substitutes the attached August 23, 2018 email. The August 23, 2018 email, substituted Exhibit C, is an email from the President and General Manager of NPBL to NSR personnel, none of which are NPBL Board members. The August 23 email makes the same point as the September 13 email, i.e., that NPBL agrees with "all other terms of the [proposed] agreement" and that "putting the [fee] matter to the STB . . . would be appropriate." This is also consistent with NPBL's reply where it stated that "initiation of a Board proceeding to resolve the compensation question is appropriate." NPBL Reply at 3.

Having withdrawn the original Exhibit C containing the September 13 email and substituting the August 23 email, there is no need to grant the motion to strike. It is now moot.¹

B. Mediation Request

NPBL's Reply suggests that the dispute "may well be suited for a facilitated resolution through the Board mediation procedures." Id. at 7. NSR notes that the parties both acknowledge that they have been discussing the compensation issue, along with other issues, for over two years. It was because of the impasse on the compensation issue that both parties now agree that "initiation of a Board proceeding to resolve the compensation question is appropriate." Id. at 3. Given that the parties have been unable to reach agreement on the compensation issue for over two years of discussions, mediation is unlikely to be successful and would simply postpone the need for a Board resolution of the compensation issue. As such, NSR does not see the need for mediation as to the merits at this time.²

C. Discovery And Procedural Schedule

The core of NPBL's Reply is to object to the NSR proposed procedural and discovery schedule. NSR has suggested a period of discovery whereby both parties are entitled to file and seek discovery on any proposed methodology a party desires to evaluate, analyze, and eventually propose and then simultaneous filings of opening, reply, and rebuttal. NSR suggested 60 days for discovery and an additional 45 days for evidence preparation, which NPBL argues is an attempt to limit NPBL's ability to develop and present its preferred methodology. NSR seeks no such "short cut" (NPBL Reply at 5) to NPBL's ability to fully undertake whatever relevant

¹ Nonetheless, if the Board, out of abundance of caution, believes that it should officially strike the September 13 email, NSR does not object.

² Mediation might be appropriate after the record is complete and the parties have a better understanding of the methodologies presented and the various resulting compensation levels.

discovery NPBL seeks to fully evaluate whatever compensation methodology it desires to present.

NSR's sole goal in proposing its schedule was to avoid protracted simultaneous fights over both the scope of discovery issue and the proper methodology. Such protracted fights are what occurred recently in New England Central Railroad, Inc. – Trackage Rights Order – Pan Am Southern LLC, FD 35842 (STB served Oct. 31, 2017) ("NECR"). In that proceeding, NECR requested the Board to first establish the methodology the parties should use, and, at the same time, resisted discovery related to any other methodology. Such an approach resulted in more than a year's worth of litigation before the parties could even present their opening evidence and proposed methodologies.

NPBL's bi-furcation approach is substantially similar to NECR's approach and would inevitably lead to the same type of disputes and delay. NPBL's approach would require the Board to endure two rounds of discovery and filings and issue two separate decisions. First, the parties would argue over what methodology should apply and have the Board set one methodology. Of course, determining what methodology a party would desire to set forth for the Board to adopt requires parties to undertake the precise type of discovery that NSR is proposing. However, whereas NSR's approach would then move straight to evidence and a decision on the merits,³ NPBL's approach would require opening and reply comments on which methodology

³ Having one round of discovery on all potential SSW methodologies and then one decision by the Board is fully consistent with the Board's decision in NECR where it refused to grant NECR's bi-furcation request because bi-furcation would "add a further round of evidence and argument, reply submissions, and an interlocutory decision from the Board," but in contrast, allowing discovery and filings based upon any SSW methodology a party wished to present would "enhance efficiency" and "allow the Board to "evaluate the parties' respective calculations, and then set the terms and conditions of the TO based on the full evidentiary record" in one decision. NECR at 5.

should apply. Once the Board sets the methodology, there would likely be another round of discovery and then another round of evidence and reply comments. Only then would the Board issue an actual decision on the ultimate merits.

NSR seeks to avoid such a time consuming and cumbersome process by allowing one round of discovery on all relevant data related to any SSW methodology a party desires to pursue.⁴ Then a round of opening evidence, replies, and rebuttals. Under NSR's approach, there would be one round of discovery, not two; three rounds of filings, not four (or more); and one Board decision on the merits, not two. This saves time and money and requires the Board to only make one decision on the merits.⁵

NPBL's objection to NSR's approach seems to be based, in part, on the notion that 105 days from the initiation of discovery isn't enough time to take discovery on all potential methodologies, evaluate them, and then present opening evidence and argument. Although

⁴ To be clear, NSR assumes and proposes that discovery, and any subsequent filings based upon that discovery, be limited to the information necessary to develop compensation under any of the established approaches in St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW I), 1 I.C.C.2d 776 (1984) and St. Louis Southwestern Railway—Trackage Rights Over Missouri Pacific Railroad—Kansas City to St. Louis (SSW II), 4 I.C.C.2d 668 (1987) (collectively, SSW). NSR is not proposing that parties should be free to take discovery and present evidence on any methodology not recognized in SSW.

⁵ For readily apparent reasons, NSR believes that a bi-furcated schedule would delay the process, not expedite it. Unfortunately, delay favors NPBL. NSR has requested that any new compensation be retroactive to the initiation of this proceeding – which, at present date, is only to say it would apply prospectively. See Nat'l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Compensation, 348 I.C.C.926, 935-37 (1977) (declining to apply compensation retroactively for four years absent agreement, but instead imposing compensation retroactively to the ICC's initial order in the proceeding). Despite agreeing to the initiation of the proceeding to set compensation, NPBL opposes retroactivity. NPBL Reply at 6-7. If the Board accepts NPBL request, then NPBL will have every incentive to drag out this proceeding so as to avoid as long as possible having to pay any new compensation figure, which most likely is going to be higher than the existing rate, which has been in place over one hundred years.

NPBL did not propose any alternative timeline, NSR is certainly open to further time or some other structure⁶ so as to ensure both a full discovery period and a timely end so as to move forward on the merits. NSR's intent was not to present an "abbreviated and one-sided procedural schedule," *id.* at 6, but rather to propose the outline of a process that would be fair to all parties while limiting the need for Board decisions and intervention. NSR believes that the Board can fashion a procedural schedule similar to that suggested by NSR that would be fair to all parties.

The Board should be aware that to avoid any misunderstanding NPBL may have had with respect to NSR's proposed approach and to hopefully reach a consensus and understanding, counsel for NSR reached out to counsel for NPBL to discuss a consensus discovery and procedural schedule. The parties were unable to reach a consensus. In part, given that it is unclear whether or not CSX will be allowed to intervene, it appears that NPBL is reluctant to commit to any schedule without resolution of CSX's intervention and (depending on that outcome) CSX's consent.⁷ NPBL counsel also continues to insist on a bi-furcated schedule.

NSR would have preferred to present the Board with a consensus revised schedule, but that appears unlikely. NSR has no intent to limit NPBL's ability to obtain relevant data and have adequate time to present that data. NSR only desires to ensure that the proceeding advances quickly and efficiently. NSR's proposal avoids the delay associated with parties first arguing over the appropriate methodology, having the Board set that methodology, having fights over

⁶ For example, the Board could expand the time for discovery to 90 days, or, alternatively, establish a single, longer period for both discovery and filing of opening evidence.

⁷ CSX has petitioned to intervene in this proceeding. In a related concurrent filing, NSR is opposing CSX's request to intervene. Giving CSX a seat at the table when its interests are substantially similar to NPBL's only complicates the record and the Board's ability to resolve this proceeding efficiently. Nonetheless, if CSX is allowed to intervene, any short period of Board supervised mediation limited to the development of a procedural and discovery process, as discussed below, would presumably include all three parties.

discovery related to that methodology, and then presentation and argument of the record, all of which can lead to significant delay. Instead, under NSR's proposal, parties would be free to conduct discovery on any relevant SSW data and then file their proposed compensation terms under any SSW approach. Each party would then be allowed to file a reply and then rebuttal. This gives each party an equal opportunity to make its case and reply to the other's proposal. The Board would then have a full record in front of it to make its decision.

NSR asks the Board to adopt NSR's proposed schedule, adding additional time to the discovery period and making corresponding adjustments as necessary in light of NPBL's stated concern. In the alternative, if the Board is not prepared to adopt a schedule at this time but is at least willing to provide guidance on the structure of the proceeding so as to put a framework around further consensual discussions, NSR would consent to a short mediation period restricted solely to the development of a specific, consensual procedural and discovery process.

Respectfully submitted,

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REVISED EXHIBIT C

From: Moss, Cannon
Sent: Thursday, August 23, 2018 10:41 AM
To: Jenkins, Cheryl <Cheryl.Jenkins@nscorp.com>
Cc: Hunt, Randall W. <Randall.Hunt@nscorp.com>; Brand, Saby M. <Saby.Brand@nscorp.com>
Subject: RE: NPBL JF costs 2017-2012

Cheryl:

We are fine with all the other terms of the agreement, just not on the per car fee. We feel that putting the matter to the STB to make an independent determination of reasonable compensation would be appropriate.

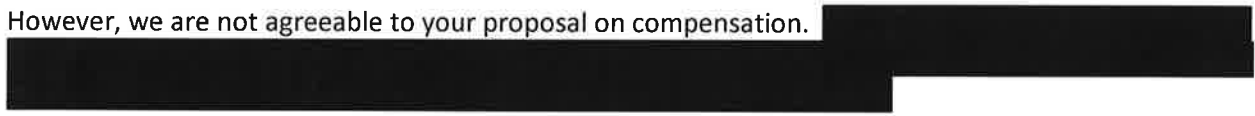
Cannon

From: Jenkins, Cheryl
Sent: Wednesday, August 1, 2018 3:53 PM
To: Moss, Cannon <Cannon.Moss@nscorp.com>
Cc: Hunt, Randall W. <Randall.Hunt@nscorp.com>; Brand, Saby M. <Saby.Brand@nscorp.com>
Subject: RE: NPBL JF costs 2017-2012

Cannon:

Thanks for the response. NS would be agreeable to those insurance amounts.

However, we are not agreeable to your proposal on compensation.



If NPBL is not agreeable to that amount, NS will begin the process to put the matter to the STB to make an independent determination of reasonable compensation. We will also go back to see if we will ask for review of any other terms of the agreement; if NPBL would challenge any additional terms besides compensation if the matter went to the STB, please let us know.

Cheryl

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Norfolk Southern Railway Company's reply to the motion to strike and mediation request filed by the Norfolk & Portsmouth Belt Line Railroad by mailing copies of this reply via prepaid first class mail to all parties of record or by more expeditious means of delivery.

Dated at Washington, D.C. this 23rd day of October, 2018.



William A. Mullins
Attorney for Norfolk Southern Railway Company