

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

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

October 3, 2018

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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

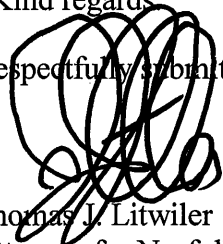
Re: **Docket No. FD 36223**
Norfolk Southern Railway Company -- Petition to
Set Trackage Rights Compensation -- Norfolk and
Portsmouth Belt Line Railroad Company

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

**REPLY OF NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY TO PETITION TO
SET TRACKAGE RIGHTS COMPENSATION**

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

James L. Chapman, IV
Crenshaw, Ware & Martin, PLC
150 West Main Street, Suite 1500
Norfolk, Virginia 23510
(757) 623-3000

**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

**REPLY OF NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY TO PETITION TO
SET TRACKAGE RIGHTS COMPENSATION**

Norfolk and Portsmouth Belt Line Railroad Company ("NPBL") hereby replies to the petition of Norfolk Southern Railway Company ("NS") to determine compensation terms for long-standing trackage rights held by NPBL over NS rail lines in Chesapeake and Norfolk, Virginia (the "NPBL Trackage Rights"). NPBL agrees that the Board has jurisdiction over this matter and should initiate a proceeding in response to NS's petition. NPBL also concurs in the basic scope of the issues to be addressed in such a proceeding. NPBL disagrees, however, with various other aspects of the NS petition, specifically including the proposed procedural schedule and NS's suggested approach -- or lack of an approach -- to determining the appropriate compensation methodology that would apply. It is important that the Board establish an orderly process for considering and deciding the compensation terms that will in the future govern the NPBL Trackage Rights, which are vital to NPBL's provision of neutral and competitive switching services in the Hampton Roads area.

BACKGROUND

NPBL is a Class III switching and terminal railroad originally formed in 1896 and historically owned by eight line-haul railroads. As a result of various mergers, NPBL is today

jointly owned by NS (57.143%) and CSX Transportation, Inc. ("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 NS extending from NS Junction in Chesapeake through Carolina Junction to West Junction in Norfolk, a distance of approximately 11 miles. 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").¹ NIT is an important rail-marine terminal facility that is directly served by NS and to which NPBL also provides neutral switching access. NPBL serves other industries on its West Junction-NIT rail line as well. In addition to serving as a connecting link between NPBL's rail lines at NS Junction and West Junction, the NPBL Trackage Rights permit NPBL to provide certain local service along the host NS rail lines.²

On July 31, 2015, NS gave written notification of the termination of the 1917 and related subsequent trackage rights agreements, to be effective on July 31, 2016. NS has explained that it did so in order to "modernize" various provisions of the agreements, including insurance and compensation. NS Petition at 3. As NS notes, the parties agreed that, upon the termination, they would continue to operate on a month-to-month basis under the terms of the

¹ See *Virginia Port Authority -- Acquisition Exemption -- Norfolk and Portsmouth Belt Line Railroad Company*, Docket No. FD 35532 (STB served August 1, 2011) (approving "State of Maine" transaction involving NPBL's West Junction-NIT rail line).

² NS describes the historic 1917 agreement governing the Carolina Junction-West Junction segment as solely conveying "overhead trackage rights," NS Petition at 2, n.3, but that is not correct. The draft trackage rights agreement tendered with NS's petition preserves the local service rights that NPBL currently possesses. NS Petition, Exhibit B at Articles 3.1, 3.2 and 7.

former agreements and as if those agreements remained in effect. NS Petition at 1, n.1 and 3. NPBL's operations pursuant to the NPBL Trackage Rights have continued on that basis since August 1, 2016. After giving notice of termination, NS eventually commenced negotiations with NPBL for a new trackage rights agreement, although NS did not provide any indication of the level of compensation it was seeking until April of 2016 -- nine months after the termination notice -- and did not propose a new trackage rights agreement until the end of August of 2016 -- thirteen months after notice of termination and a month after actual termination of the prior agreements.

The parties have reached substantive agreement on many aspects of a new agreement to govern the NPBL Trackage Rights. NS filed its current petition after the parties were unable to reach agreement on revised compensation terms.

DISCUSSION

As NS indicates, the Board has jurisdiction in this context to determine the compensation for NPBL's future exercise of the NPBL Trackage Rights. NS Petition at 1, 4; *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1946). While the draft agreement attached to NS's Petition does not, from NPBL's perspective, represent final, binding language as to every other aspect of the new trackage rights agreement,³ NPBL agrees that the parties have reached substantive resolution on significant issues other than compensation, and that initiation of a Board proceeding to resolve the compensation question is appropriate.

³ Given, for example, the need for this presumably significant proceeding to have the Board determine compensation amounts, the 15-year trackage rights term contained in Article 16.2 of the draft agreement seems unduly abbreviated. Also, the broad confidentiality provisions in Article 23 of the draft agreement would now appear largely moot, given that NS has attached the agreement to its petition with only limited redactions.

NS's suggested process for such a proceeding, however, is lacking in many respects. NS does not disclose the standards that it proposes to govern the Board's compensation determination, even failing to indicate whether it agrees to the familiar framework of *St. Louis Southwestern Ry. Co. -- Trackage Rights Compensation*, 1 I.C.C.2d 776 (1984) and 4 I.C.C.2d 668 (1987) ("*SSW Compensation*"). Within that framework, in turn, are significant predicate questions about the appropriate methodology to be used in determining the valuation base for the interest rental component of trackage rights compensation.⁴ Once a preferred methodology is determined, there then remain complex factual and evidentiary issues in the application of that methodology to the particular case before the agency.

Faced with this situation, the agency has explained that:

Based on our experience in recent similar cases, we believe it would be less burdensome on all concerned to resolve any disputes as to the proper methodology before having the parties submit the actual data to be used in determining the valuation base and interest rental rate. Simultaneous opening and reply statements will be used in this phase of the proceeding to speed up the process. In their statements, the parties should apprise us of their views on methodology as well as offering procedural suggestions on how best to move forward in the evidentiary phase. After considering their comments, we plan to issue a decision resolving the methodology and a procedural schedule for the evidence leading to a final decision on the merits.

Atchison, T. & S.F. Ry. Co. -- Operating Agreement, 8 I.C.C.2d 297, 304 (1992); *see also Atchison, Topeka & Santa Fe Railway Company -- Operating Agreement -- Southern Pacific*

⁴ The Board has generally recognized four potential valuation methodologies: capitalized earnings (CE); reproduction cost new less depreciation (RCNLD); comparable line sales; and stand-alone cost. *See, e.g., New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC*, Docket No. FD 35842 (STB served October 31, 2017) ("*NEC/PAS*") at 3. The latter two methodologies have been seldom, if ever, utilized in trackage rights compensation cases, and would present noteworthy considerations of first impression should NS decide to pursue them. NPBL also notes that, in the middle of the *NEC/PAS* proceeding, the trackage rights landlord interjected an entirely new proposed valuation methodology, resulting in added complexity and delay in the handling of that proceeding.

Transportation Company, Docket No. FD 22218 (ICC served March 26, 1993) (selecting methodology and providing guidance on evidentiary filings).

NS seeks to short-cut this approach, providing for a single 60-day discovery period, followed by opening, reply and rebuttal submissions. NS Petition at 5. As the landlord, NS is already in possession of most of the information that is relevant to a compensation determination. The need for, and burden of, conducting discovery thus falls by necessity primarily on NPBL as the tenant. *See New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC*, Docket No. FD 35842 (STB served February 12, 2016) ("*NEC/PAS Methodology*") at 5 (Because [landlord] is the only source for some of this information, [tenant] could only obtain it through discovery."). NS would apparently have NPBL, in 60 days, conduct discovery on the relative desirability of all four potential valuation methodologies, as well as on the actual evidentiary application of all four of those methodologies (since NS could elect to use any of them when it files its evidence), as well as on any other potential theory that NS might chose to advance at that time.⁵ There is nothing orderly or efficient about such a process.

NS claims that its proposal "avoids the delay" supposedly associated with a bifurcated approach. But it has been more than three years since NS gave notice of its termination of the existing trackage rights agreements, and more than two years since those agreements were actually terminated. The parties have negotiated, NPBL believes, in good faith,

⁵ Despite NPBL's requests, NS has declined to provide any basis for its requested compensation amount, which most recently was \$70/car, or approximately \$6.35/car mile for traffic moving the entire distance of the NPBL Trackage Rights. *Compare NEC/PAS* at 10, 14, 18 (setting trackage rights compensation at \$1.06/car mile and finding landlord's proposed valuation methodology that would result in compensation of \$6.70/car mile to be a "significant outlier," producing a line valuation many times greater than any of six other valuations in the record).

but NS has not proceeded with any sense of urgency. Its sudden need to rush now is neither credible nor persuasive.

NS also relies on *NEC/PAS Methodology*, where the Board declined a request to make a preliminary determination as to the appropriate compensation methodology. NS Petition at 5, n.4. But that request came in the middle of the proceeding, after the trackage rights landlord had "already submitted its opening argument and evidence based on its preferred methodology" *NEC/PAS Methodology* at 5. Having seen that argument and evidence, the trackage rights tenant would then have the opportunity to complete discovery before filing its reply evidence and argument. *Id.* Indeed, the parties then agreed to another round of discovery before the submission of rebuttal and surrebuttal filings. *New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC*, Docket No. FD 35842 (STB served June 6, 2016) (adopting further procedural schedule).⁶ The Board here has the opportunity to avoid at the outset the disorderly route on to which the *NEC/PAS* proceeding veered. And if the Board is not inclined to adopt a bifurcated approach here, *NEC/PAS Methodology* provides no justification or support for the abbreviated and one-sided procedural schedule that NS has proposed.

NPBL also notes that NS has requested that the Board's ultimate compensation determination in this proceeding be effective retroactively to the filing date of NS's petition. NS Petition at 2, 6. NPBL has not consented to retroactivity, and indeed as NS expressly admits the parties agreed that trackage rights operations would continue on a month-to-month basis under

⁶ That schedule allowed 55 days from the service of discovery for the filing of any motions to compel, and then provided that the next round of substantive pleadings would begin "60 days from when any discovery disputes have been resolved, and both Parties have confirmed that discovery is complete." NS's proposed procedural schedule here, by contrast, proposes 60 days for the entire completion of the discovery process, and just 45 days from then for the filing of opening statements and evidence. NS Petition at 5.

the terms of the prior agreements, "as if the Agreement[s] remained in effect." NS Petition at 1, n.1 and 3. The Board recently declined to give retroactive effect to a new trackage rights compensation determination, consistent with precedent that made new terms effective prospectively unless the parties consented to retroactivity. *NEC/PAS* at 27-28; *see National Rail Pas. Corp. -- Applic. Under Section 402(a)*, 1 I.C.C.2d 243, 248 (1984); *National R. Pass. Corp. and UP Tracks & Facilities*, 348 I.C.C. 926, 935-937 (1977). The Board should follow the same course here.

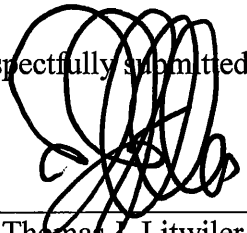
Finally, while NS refers at times to the desired establishment of a "singular per car or per car mile fee," NS Petition at 4, elsewhere it refers solely to the "appropriate level of per-car compensation to be paid by NPBL to NSR." NS Petition at 6 (emphasis added). As noted above, the NPBL Trackage Rights include a local (in addition to overhead) service element that necessarily entails railcars not being handled by NPBL over the entire length of the subject NS rail line. NPBL also has the right to interchange traffic via the NPBL Trackage Rights with the Buckingham Branch Railroad at Coleman Place, which is an intermediate point on the NS line. NS Petition, Exhibit B at Article 3.1. Given these movements that only traverse a portion of the NPBL Trackage Rights, and consistent with extensive agency practice, trackage rights compensation in this proceeding should be determined on a per car-mile basis.

While initiation of a proceeding is appropriate, NPBL submits that the subject trackage rights dispute may be well-suited for a facilitated resolution through the use of the Board's mediation procedures as set forth at 49 C.F.R. § 1109. At a minimum, Board-sponsored mediation, even if ultimately unsuccessful, could serve to narrow the scope of disagreement and focus issues that may remain for the Board to adjudicate. For these reasons, should the Board initiate a proceeding as the parties have agreed should be done, the Board should factor into any

procedural schedule a Board-sponsored mediation period, subject, of course, to NS's consent to such mediation.

WHEREFORE, NPBL respectfully requests that the Board initiate a proceeding in response to the NS Petition, find that an initial determination should be made as to the appropriate compensation methodology to be utilized, and direct the parties to confer and present an appropriate procedural schedule to the Board.

Respectfully submitted,

By: 

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

James L. Chapman, IV
Crenshaw, Ware & Martin, PLC
150 West Main Street, Suite 1500
Norfolk, Virginia 23510
(757) 623-3000

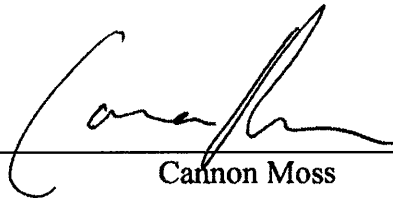
**ATTORNEYS FOR
NORFOLK AND PORTSMOUTH BELT
LINE RAILROAD COMPANY**

Dated: October 3, 2018

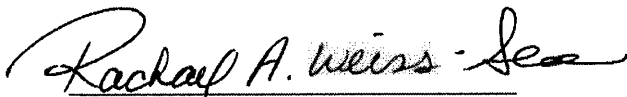
VERIFICATION

Commonwealth of Virginia)
)
City of Chesapeake) SS:

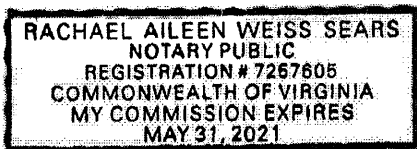
Cannon Moss, being duly sworn, deposes and says that he is President and General Manager of Norfolk and Portsmouth Belt Line Railroad Company (NPBL), that he has read the foregoing Reply and knows the facts asserted therein as to NPBL, and that the same are true as stated.


Cannon Moss

SUBSCRIBED AND SWORN TO
before me this 3 day
of October, 2018.


Notary Public

My Commission expires: May 31, 2021

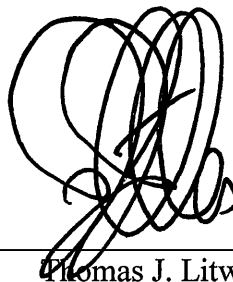


CERTIFICATE OF SERVICE

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

William A. Mullins, Esq.
Crystal M. Zorbaugh, Esq.
Baker & Miller PLLC
2401 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC 20037
wmullins@bakerandmiller.com

Garrett D. Urban, Esq.
General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Garrett.Urban@nscorp.com

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

Thomas J. Litwiler