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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 to the Petition for Leave to Intervene of CSX Transportation, Inc. in the above-captioned 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](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 36223**

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

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**REPLY TO PETITION FOR LEAVE TO INTERVENE  
OF CSX TRANSPORTATION, INC.**

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**Attorneys for Norfolk Southern Railway  
Company**

**Dated: October 23, 2018**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 36223**

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

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On September 13, 2018, Norfolk Southern Railway Company (“NSR”) filed a petition to determine the level of trackage rights compensation that should govern the trackage rights that Norfolk & Portsmouth Belt Line Railroad Company (“NPBL”)<sup>1</sup> operates over NSR’s tracks located in Norfolk, VA and Chesapeake, VA (referred to herein as “TR Petition”). On October 3, NPBL filed a reply, objecting to NSR’s proposed schedule and some other preliminary procedural issues, but agreeing that “initiation of a Board proceeding to resolve the compensation question is appropriate.” NPBL Reply at 3. On that same date, CSX Transportation, Inc. (“CSXT”) filed a Petition to Intervene in the above-captioned proceeding (“Pet. to Intervene”).

CSXT asserted two bases for its intervention: “(1) its minority ownership interest in NPBL; and (2) its interest in being able to serve customers at or near NIT via the NPBL using the Line.” Pet. To Intervene at 6. As explained herein, allowing CSXT to intervene would unduly complicate the procedural and substantive administration of this proceeding. It also would allow CSXT to unduly broaden the issues in front of the Board. As shown by CSXT filing a copy of its court suit filed in the Eastern District of Virginia, CSXT’s concerns are

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<sup>1</sup> NSR and NPBL are referred to collectively as the “Parties.”

inherently related to alleged violations of its rights as a minority shareholder and alleged violations of the antitrust laws. Those issues are not, and should not be, the focus of the Board's proceeding. Allowing CSXT to intervene in this proceeding would only expand the scope of the dispute. Accordingly, NSR respectfully requests that the Board deny the Pet. to Intervene.

### **Legal Standard And Argument**

Pursuant to 49 CFR §1112.4(a): (a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention: (1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and (2) Would not unduly broaden the issues raised in the proceeding. CSXT's Pet. to Intervene fails on both accounts.

Granting the Pet. to Intervene will unduly disrupt the procedural schedule for resolving this dispute. As it stands, there are only two parties -- NPBL and NSR -- who, absent a Board imposed procedural and discovery schedule, need to consult and agree to a schedule, conduct discovery, and submit evidence and filings in this proceeding. Through its Pet. to Intervene and in discussions with CSXT's counsel, it is clear that CSXT intends to have a "full seat" at the table. CSXT desires to participate in the establishment of a procedural schedule, undertake full discovery, propose its own methodology, and intends to be part of any mediation ordered by the Board. Clearly adding a third party to the mix does not simplify matters, but complicates them and disrupts the efficient administration of this case.

And for what purpose would allowing CSXT to intervene serve? CSXT's interests are already fully protected and in alignment with NPBL's. This proceeding seeks the establishment of fair compensation for NPBL's trackage rights over NSR's tracks using well known Board precedent. Indeed, NPBL itself asserts that it seeks compensation terms that preserve its ability to provide neutral and competitive switching services to all the shippers and railroads in the

Hampton Roads area. NPBL Reply at 3. The Board has previously granted a shareholder's petition to intervene in a financial proceeding when the intervening party's objective was in conflict with the parties litigating the compensation issue before the Board,<sup>2</sup> but such is not the case here. Granting intervention here is unnecessary because both NPBL's and CSXT's objective in the controversy in question is the same -- for NPBL to operate over NSR at a reasonable cost. See id. at 3.

Given that NPBL and CSXT's objective is the same -- the establishment of fair compensation for NPBL's trackage rights over NSR's tracks -- there is simply no reason to grant the Pet. to Intervene at this time. The Board has denied motions to intervene on similar bases and should do so here.<sup>3</sup> Granting CSXT the right to intervene would be license for every shipper utilizing a line and every connecting railroad to intervene in trackage rights cases going forward. It also frustrates the ability of NPBL, NSR, and the Board to adopt an efficient and orderly schedule to resolve this proceeding. As such, CSXT fails to meet the first test justifying intervention.<sup>4</sup>

Allowing CSXT to intervene would also unduly broaden the issues raised in the proceeding. Even though CSXT has not yet been granted the right to intervene, it has filed in

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<sup>2</sup> North Carolina Railroad Company – Petition to Set Trackage Compensation and other Terms and Conditions – Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company, FD 33134 (STB served May 29, 1997).

<sup>3</sup> See Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, In Mahoning and Columbia Counties, OH, and Beaver County, PA; Railroad Ventures, Inc. – Acquisition and Operation Exemption – Youngstown & Southern Railroad Company Request to Set Terms and Conditions, AB-556 (Sub-No. 2X), FD 33385 (STB served January 7, 2000) (denying intervention because petitioner's interests were similar to one of the parties and the record was sufficient for the Board to address the pertinent issues without the petitioner's participation.)

<sup>4</sup> In the unlikely event that issues later develop in this proceeding in which CSXT's interests diverge with NPBL, CSXT could seek leave to intervene at that time.

this proceeding a copy of a suit it has filed in the United States District Court for the Eastern District of Virginia, individually and on behalf of NPBL against NS, NPBL, Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss. The suit alleges, among other things, antitrust claims and that NSR, NPBL, and the aforementioned directors are violating duties to minority shareholders and failing to act in the best interest of NPBL.<sup>5</sup>

What is CSXT's purpose in filing this document? Does CSXT intend to use the STB proceeding as a means of seeking discovery that it may not be entitled to seek in a court of law? Does CSXT intend to use the STB to get a second bite at the apple or another forum to seek its antitrust and minority shareholder claims? If CSXT has a full seat at the table will it link any mediation or potential settlement of STB issues with its court proceeding? The answer to these questions is unclear, but one thing is for certain, allowing CSXT to intervene opens the door for precisely the type of disruptive broadening of issues that the Board seeks to avoid in applying 49 CFR §1112.4(a)(2).

The Board should not take the risk that this proceeding becomes a forum to argue unrelated claims that are already the subject of a court proceeding. The Board is simply not the proper forum for addressing such concerns. The Board made this clear in past proceedings, holding "the Board has no statutory mandate to review the fairness of voluntary agreements, much less to entertain complaints in the nature of shareholder derivative suits."<sup>6</sup> CSXT's transparent attempt to use the Board to open a second forum for pursuing its antitrust and

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<sup>5</sup> CSXT submitted a letter into the record on October 5, 2018 providing the Board a copy of the federal court lawsuit.

<sup>6</sup> North Carolina Railroad Company – Petition to Set Trackage Compensation and other Terms and Conditions – Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company, FD 33134, slip op. 2 (STB served Oct. 15, 1999).

fiduciary duty concerns runs the risk of broadening the issues in question, complicates the record, makes more work for the Board, and unnecessarily delays the establishment of trackage rights compensation. It is in NSR and NPBL's interest for the Board to establish trackage rights compensation expeditiously without having to litigate unrelated issues that should be addressed in an alternate forum. Because CSXT has not demonstrated that its participation is warranted, the Board should deny the Pet. to Intervene.

### CONCLUSION

While procedural issues still need to be resolved, the Parties have spent over two years negotiating appropriate trackage rights compensation to govern the trackage rights that NPBL operates over NSR's tracks located in Norfolk, VA and Chesapeake, VA. The Parties are in agreement that initiation of a Board proceeding to resolve the compensation question is appropriate and necessary. The Board has the statutory authority to establish trackage rights compensation based on the evidence offered by the Parties.<sup>7</sup> Permitting CSXT to force its way into the proceeding when its interests are already aligned with NPBL's only complicates the record and reduces the likelihood of an efficient resolution to proceeding. Moreover, CSXT's filings betray its intent to use the STB to contest unrelated claims against NSR (and NPBL) that CSXT has already brought in another forum. The Board should deny CSXT's Petition to Intervene.<sup>8</sup>

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<sup>7</sup> Contrary to CSXT's argument set forth in its footnote 7, Pet. to Intervene at 5, n. 7, the trackage rights at issue in this proceeding have been subject to the ICC's jurisdiction, and that of the STB, for almost a hundred years. As such the STB has the jurisdiction to establish the new terms and conditions. A legal issue that neither NSR nor NPBL contest. See Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company, FD 31281, 6 I.C.C. 2d 619, 1990 ICC LEXIS 110 (STB served March 23, 1990).

<sup>8</sup> If CSXT is allowed to intervene, which it should not be, at a minimum, it should not be allowed to broaden the issues before the Board. It is in NSR's, the shippers', and the Board's interest to

Respectfully submitted,



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Attorneys for Norfolk Southern Railway Company

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establish trackage rights compensation expeditiously. Accordingly, regardless of whether CSXT is granted leave to intervene, the Board should move forward with the establishment of a procedural and discovery schedule.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of Norfolk Southern Railway Company's reply to the Petition for Leave to Intervene of CSX Transportation, Inc. 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 23<sup>rd</sup> day of October, 2018.



William A. Mullins

Attorney for Norfolk Southern Railway Company