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**BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496**

**APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION
UNDER 49 U.S.C. § 24308(e) – CSX TRANSPORTATION, INC. AND NORFOLK
SOUTHERN CORPORATION**

**CSX TRANSPORTATION, INC.'S AND NORFOLK SOUTHERN RAILWAY
COMPANY'S REPLY TO MOTION TO STRIKE**

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Dated: December 27, 2021

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SUMMARY

On December 6, 2021, the National Passenger Railroad Corporation (“Amtrak”) filed a Motion To Strike (“Motion”) seeking to strike both the “Opening Evidence” filed on November 3, 2021, and the “Reply Comments and Evidence” on December 3, 2021, by the Alabama State Port Authority (“ASPA”) and Terminal Railway Alabama State Docks (“TASD”) (collectively, the “Port”). Norfolk Southern Railway (“NSR”) and CSX Transportation, Inc. (“CSXT”) oppose the Motion. Amtrak’s Motion is untimely and fails to meet the legal standard for striking evidence and comment. Amtrak’s Motion also fails to meet the legal standards for striking the Port’s intervention request. Furthermore, if the Port was required to petition to intervene, it has done so properly and its request should be granted.

BACKGROUND

The Alabama State Port Authority made its first appearance in this proceeding on April 5, 2021. On that date, John Driscoll, Director & Chief Executive Officer of the Port, submitted a letter expressing substantial concern over Amtrak’s plan to institute passenger service without adequate consideration and infrastructure to alleviate the Port’s concerns. Mr. Driscoll requested Amtrak to return to the bargaining table and to participate in the RTC modeling process. Amtrak

ignored his request. Amtrak did not file a motion to strike or argue that the Port's concerns should not be considered.

On April 26, Mr. Driscoll filed another letter. He again expressed how Amtrak service could substantially impair freight operations at the Port and adversely impact the surrounding communities. He again requested Amtrak to continue with the 2020 RTC Study of needed infrastructure, performed and unfinished by HDR, and to commit to working with the parties to adequately address the Port's concerns. Amtrak ignored this request. Amtrak did not move to strike, argue that the Port's views should not be considered, or argue that the Port should not be a Party of Record. Indeed, by this time, the Board had listed the Port as a Party of Record on its website. Amtrak did not object.

On October 8, the Port, through outside counsel, filed an official notice of intent to participate and of its intention to file additional comments. As the Port was already listed as a Party of Record, counsel's October 8 letter could reasonably be construed as simply a notice of appearance by recently retained counsel. Indeed, the letter specifically requested the Board to construe the filing as "notice of appearance of legal counsel on behalf of both ASPA and TASD, and update this proceeding's service list accordingly." Port October 8 Letter at 2. The letter also detailed why the Port must be afforded the full opportunity to present its views that "all railroad freight service in the vicinity of the Port of Mobile is considered and adequately protected, a matter which the Port alone is uniquely qualified to address." Id. The Board then updated its website and its Party of Record listing to identify Mr. Wimbish, as counsel for the Port, as a Party of Record to receive service copies of any future filings. Since that time, Amtrak, NSR, CSXT, DOT, and all other parties have served copies of filings on Mr. Wimbish as counsel for the Port.

On October 20, rather than filing a motion to strike or a motion to reject the filing, as it has done now (and only after seeing the damaging evidence presented by the Port), Amtrak filed a motion for clarification. After not having objected twice before to the Port's participation, Amtrak's October 20th filing requested the Board to "clarify" whether the Port could be treated as a party of record.¹ Specifically, Amtrak "respectfully request[ed] that the Board clarify that the Port may not further participate in this proceeding without first seeking and being granted leave of the Board." Amtrak Clarification Mot. at 3. In response to Amtrak's clarification request, the Board took no action. Amtrak took no further action as well.

On November 3, the Port presented its opening evidence and argument. The Port also responded on that date, via a separate letter, to Amtrak's motion for clarification. In that separate letter, the Port explained why it was already a Party of Record and why, if it were not, it should be entitled to be treated as such. Furthermore, out of an abundance of caution, the Port specifically requested, *three times*, that it be granted leave to "intervene so that it may avail itself of the promised forum and thereby assure, through appropriate mitigating measures, that TASD's railroad freight operations in the Mobile terminal (provided in support of eight separate rail carriers to which TASD supplied terminal switching services) are not unreasonably impaired by Amtrak operations." Port November 3 Letter at 2.² Amtrak did not timely file any response or

¹ The fact that the Port had hired legal counsel and intended to present evidence was of concern to Amtrak, most likely because Amtrak did not want the Board to see all of the evidence related to the impairment of the Port's freight operations.

² See also *id.* at 3 ("[T]he Port hereby requests leave to intervene as a party to present evidence as its interests may appear, and not merely in the sequestered, and ill-fitting, context of an amicus. . . . [T]he Board should clarify as necessary that the Port is a party of record, and that, as such, it is entitled to submit evidence regarding adverse freight traffic impacts resulting from Amtrak's proposed passenger train operations. In the alternative, the Board should grant the Port's request to intervene, having satisfied the criteria for intervention at Section 1112.4(a) as set forth above.").

reply to the Port's three requests in its November 3 letter to be specifically granted the right to intervene. As such, Amtrak did not address, on the merits, why the Port should not be granted the right to intervene.

It was not until December 3rd, when both the Port and Amtrak (along with CSXT and NS) filed reply evidence, that Amtrak finally addressed the merits of the Port's request to intervene. It did so in footnote 137. Perhaps realizing its feeble efforts to finally address the Port's intervention requests, after reviewing the Port's December 3 reply, which once again presented substantive evidence on why Amtrak service would impair unreasonably the freight operations of the Port's terminal rail carrier, Amtrak moved to strike the Port's opening evidence and its reply evidence.

I. THE MOTION IS UNTIMELY AND DOES NOT MEET THE LEGAL STANDARD FOR STRIKING MATERIALS FROM THE RECORD

Amtrak's Motion should be rejected as it is untimely and does not meet the standards for striking materials from the record. The Port has been a party to this proceeding since April 5 and has been represented by counsel since October 3. In total, the Port made six filings before Amtrak filed its December 6 Motion. The only pleading for which Amtrak's motion is even timely is the Port's December 3 reply.³ No other Port filings, including the Port's opening evidence, have been challenged by a timely motion to strike. As such, the Board should reject the Amtrak December 6 motion to strike, or, in the alternative, deny it as untimely.⁴

³ Absent a specific order otherwise, a motion to strike a pleading is due no later than 20 days after the pleading it seeks to strike was filed. 49 C.F.R. § 1104.13(a).

⁴ See generally, Edwin Kessler – Petition for Injunctive Relief, FD 35206 (STB served June 12, 2009); Norfolk Southern Railway Company – Acquisition And Operation – Certain Rail Lines Of The Delaware And Hudson Railway Company, Inc., FD 35873 (STB served Oct. 18, 2016); California High-Speed Rail Authority – Petition For Declaratory Order, FD 35861 (STB served May 5, 2015); Denver & Rio Grande Railway Historical Foundation – Petition For Declaratory Order, FD 35496 (STB served March 24, 2015); L.B. Foster Company – Petition For Declaratory

Even if the Motion were to be considered on its merits, it should be denied. The standard for striking a pleading (or any portion of a pleading) is set forth at 49 C.F.R. §1104.8. This standard requires Amtrak to show that the Port's filings or evidence contain "redundant, irrelevant, immaterial, impertinent, or scandalous" material. Id. Amtrak does not even attempt to meet that standard, nor could it. This is the Board's first proceeding under Section 24308(e), and thus the first opportunity for the Board to define what it means for freight transportation to be 'impaired unreasonably.' The process and standard established by the Board in this case will govern future cases, and shippers, communities, ports, and other impacted interests should have their views accepted as part of that process. Indeed, the Port's evidence regarding the impacts to freight service caused by Amtrak's proposed Gulf Coast passenger service is extremely relevant to this proceeding, given that TASP trains transverse or crossover CSXT track and are thus directly impacted.⁵ As such, Amtrak's Motion to strike should be denied on its merits and provides another basis for the Board to reject Amtrak's Motion.⁶

Order – Certain Rates And Practices Of C&H Nationwide, Inc., D/B/A C&H Transportation Company; Lyco Manufacturing Company, Inc. – Petition For Declaratory order – Certain Practices Of C&H Nationwide, Inc., D/B/A C&H Transportation Company, No. 40306; No. 40314 (ICC served Nov. 5, 1993).

⁵ Even if Amtrak is correct that the Board may only consider freight impacts on the CSXT and NSR lines, which it is not, any adverse impacts caused by Amtrak service to connecting carriers, such as the terminal railroad, could (and do) have a cascading impact on service provided by CSXT and NSR. NSR, CSXT, and the Port should be entitled to make those arguments.

⁶ Jackson County, Mo. – Acquisition And Operation Exemption – Union Pacific Railroad Company, FD 35982 (STB served Nov. 7, 2019); Application Of The National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) –Canadian National Railway Company, FD 35743 (STB served Aug. 9, 2019); Edwin Kessler – Petition for Injunctive Relief, FD 35206 (STB served June 12, 2009); Consolidated Rail Corporate – Exemption – Abandonment Of The Weirton Secondary Track In Harrison And Tuscarawas Counties, OH, AB-167 (Sub-No.1088X) (ICC served Oct. 17, 1990).

II. THE PORT HAS MORE THAN MET THE STANDARDS FOR INTERVENTION

Failing to file a timely motion to strike five out of the six filings made by the Port and to meet the legal standard for striking the Port's reply evidence (the only pleading for which Amtrak's motion is timely) are sufficient independent bases to deny Amtrak's Motion. However, the gist of Amtrak's Motion is that the Port should not be treated as a "party of record" or has not petitioned to intervene (or if it has, it has not met the standard), and thus all of the Port's filings should be rejected. Amtrak is wrong on all accounts.

As Amtrak notes, the Board's regulations define a "party" as a "complainant, defendant, applicant, respondent, protestant, intervenor, or petitioner in any proceeding" or a person who is "permitted or directed by the Board to participate in a proceeding." 49 C.F.R. § 1101.2(d). The Port certainly qualifies as a "protestant," "respondent," and an "intervenor" (having asserted many times its right to intervene). Amtrak would argue that the Port has not been "permitted or directed by the Board to participate in a proceeding." But the regulation, on its face, makes the requirement for Board permission an "or" requirement. In other words, one is a "party" if they meet the first part of the sentence (i.e., protestant, respondent, or intervenor) or have been granted the right to be a party. Indeed, the Board's website has listed the Port as a "party of record" since April 5.

Amtrak's argument that the definition of "party" does "not include persons merely signing certificates of support" (Amtrak December 3 Reply, at 41 n.138) does not apply to the Port. None of the Port's filings are mere "signed certificates of support." Quite the opposite, the Port's letters, filings, and evidence were in opposition to Amtrak's plans to restore service without sufficient mitigating infrastructure, not "certificates of support." Nor does the

regulation's provision that "[p]ersons on the docket service list merely for the purpose of receiving copies of Board releases are not considered parties to the proceeding," id., apply to the Port. None of the Port's filings requested that the Port be put on the service list "merely for the purpose of receiving copies of Board releases."

The only argument left for Amtrak is that the Port did not "formally" petition to intervene and/or it does not qualify for a grant of intervention. This argument fails as well.

First, the Port has been listed as a party of record by the Board's website, and not merely as someone who signed a certificate of support or was merely on the list to receive copies of Board releases. Indeed, NSR has served copies of all of its pleadings on the Port as a party of record and will continue to do so.

Second, the Port fits the definition of a "party" under the first part of 49 C.F.R. §1101.2(d). It is a respondent, protestant, and intervenor.

Third, whether the applicable regulation for intervening in a Board proceeding is 49 C.F.R. §1112.4 or 49 C.F.R. §1113.7, the Port has requested permission to intervene in three different places in its November 3 letter. Amtrak deems this insufficient because it claims that the Port has not "formally" petitioned to intervene. Amtrak provides no definition of what it means to "formally" petition to intervene, nor does it identify any regulation or case precedent supporting such a statement. Neither §1112.4 nor §1113.7 contain the word "formally" as a requirement for complying with that regulation. Regardless, NSR and CSXT certainly consider the Port's three different requests to intervene set out in its November 3 letter as "formally" requesting permission to intervene and the Board should as well.

Finally, assuming that either §1112.4 or §1113.7 are applicable, and given that the Port has requested permission to intervene, the Port's request more than meets the standard to grant

formal intervention under those regulations and the Board should do so. Under either regulation, the Board will grant intervention if (1) intervention does not either “unduly disrupt the schedule for filing verified statements” (§1112.4(a)) or similarly, would not “delay” the proceeding (§1113.7(a)); and (2) intervention would not “unduly broaden the issues raised in the proceeding” (§1112.4(a)) or the “issues would not be broadened.” (§1113.7(a)).

The Port has made its interest known since April 5. The Port has had counsel since October 8. At any time, Amtrak could have filed discovery against the Port, and as a party, the Port could not have objected. However, Amtrak chose not to file such discovery. The Port filed opening comments, which Amtrak replied to. The presence of the Port has not disrupted or delayed the schedule. Granting intervention to the Port would not “broaden” the issues at this stage. Indeed, the Board’s August 6th decision in this proceeding specifically noted that “this proceeding, including evidence submitted by the parties, will provide a forum to assess precisely the matter of concern to Alabama state officials and others, i.e., whether the additional train operations will unreasonably impair freight transportation.” Decision at 7 (STB served Aug. 6, 2021). As such, Amtrak has been on notice for a long time that the Port’s interest would be an issue in this proceeding. Rejecting the Port’s request to intervene would be directly contrary to the notion that the “matter[s] of concern to Alabama state officials and others” will be considered.⁷ Id.

⁷ Amtrak makes much of the fact, that in their view, the statute only contemplates impairment of freight on the lines of CSXT and NSR and no other freight railroad lines can be considered, no matter how adverse the impacts are on such connecting carriers. Even if Amtrak’s views are correct, which they are not, such a narrow view of the statute does not mean parties should be prohibited from even arguing otherwise, whether as a matter of law or fact. Amtrak’s view goes to the scope of the statutory findings, not to whether parties should or should not be allowed to even make arguments about the scope of the statute or to present evidence. The Port’s freight operations will be substantially harmed by the introduction of Amtrak Gulf Coast passenger service. The Port should be allowed to make its arguments, even if the Board ends up rejecting

CONCLUSION

The Port's evidence has struck a chord. The Port's evidence shows that Amtrak service will not only unreasonably impair CSXT's and NSR's freight service but also impair the freight service provided by the Port's terminal railroad, with cascading effects on customers and communities. But rather than dealing with the Port's arguments on the merits, Amtrak seeks to suppress these comments. By doing so, Amtrak wants the Board to ignore the adverse impacts of its proposed Gulf Coast passenger service. This the Board should not do.

Amtrak's Motion was untimely and does not meet the standards applicable for striking evidence or pleadings. Amtrak's concurrent argument that the Port is not a party of record and should not be allowed to intervene also fails. The Port has been a party of record since the very beginning of this proceeding, as recognized by the Board's service list. In addition, the Port has asked, several times, for the right to intervene. Thus, even if the Board has not yet officially granted the Port the right to intervene (and it is not clear that the Board is required to do so), the Port should be given the right to intervene. Intervention at this stage does not delay the proceeding or broaden the scope of the issues already in front of the Board.

It has always been Board policy to allow members of the public, including ports, shippers, government officials, communities, and other railroads, an opportunity to have their concerns considered in a proceeding. While the Port should not have to be granted formal rights to intervene because it has been a party of record since the beginning, if the Board believes it

them as a matter of statutory interpretation. Amtrak's view would shut down any input by shippers, connecting railroads, ports, government officials, or other members of the public about the meaning of the statute and impacts of the proposed Amtrak service. Certainly, neither Congress nor the Board envisioned a process whereby only the views of Amtrak and the directly impacted freight railroads could be expressed. The Board should not take such a narrow view of who can and who cannot even participate in an Amtrak access proceeding and thereby limit the input it receives in this case of first impression or in future such cases.

needs to permit intervention, it should do so. It would be contrary to numerous Board precedents to deny the Port the right to intervene so that its views can be heard.⁸ Amtrak's Motion should be denied.

Respectfully submitted

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⁸ Naval Nuclear Propulsion Program, United States Army Military Surface Deployment And Distribution Command, and Fluor Marine Propulsion, LLC – Petition For Declaratory Order, FD 36298 (STB served Oct. 15, 2019); Horry Cnty., S.C. v. Balt. & Annapolis R.R., NOR 42138 (STB served Nov. 25, 2013); MCM Rail Services LLC – Petition For Retroactive Exemption – In Sparrows Point, MD; MCM Rail Services LLC D/B/A Baltimore Industrial Railroad – Operation Exemption – HRE Sparrows Point, LLC, FD 35707; FD 35725 (STB served June 11, 2013); Canexus Chemical Canada L.P. v. BNSF Railway Company – Emergency Service Order; Canexus Chemical Canada L.P. v. BNSF Railway, FD 35524; NOR 42131 (STB served Oct. 14, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December 2021, a copy of the foregoing Reply To Amtrak's Motion To Strike was served by email or first-class mail on the service list to Finance Docket No. 36496.

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