

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

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

AMTRAK'S MOTION TO STRIKE

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The National Railroad Passenger Corp. (“Amtrak”), by and through undersigned counsel, respectfully moves to strike the comments and evidence of the Alabama State Port Authority and Terminal Railway Alabama State Docks (collectively “the Port”). As Amtrak already explained in its pending Motion for Clarification and again in its Reply Argument and Evidence, the Port is not a party to this proceeding, statutorily or otherwise, and is not entitled to present evidence and argument in this proceeding without first seeking and being granted leave of the Board. Nonetheless, the Port has filed not only “Opening Evidence,” but also “Reply Comments and Evidence,” thus apparently believing it has rights even beyond those granted to the *actual* parties and can file “evidence” whenever and however it wants. Because the Port has failed to seek proper leave of the Board to participate as a party, the Port’s purported “Reply Comments and Evidence” (as well as its “Opening Evidence”) should be stricken from the official evidentiary record of this proceeding and disregarded by the Board.

The Board’s procedural schedule issued on August 6, 2021, allowed for the presentation of “opening evidence” from CSX Transportation, Inc (“CSXT”) and Norfolk Southern Railway Company (“NSR”), “Amtrak reply evidence,” and “CSXT and NSR rebuttal evidence.” *Application of the Nat’l Passenger R.R. Corp. Under 49 U.S.C. § 24308(E)—CSX Transp., Inc.,*

and Norfolk Southern Ry. Co., FD 36496, slip. op. at 12 (STB served Aug. 6, 2021). On October 8, 2021, the Port filed a letter giving notice of “the Port’s intent to present evidence and argument in this proceeding,” even though the Port acknowledged that the Board’s “order facially contemplates presentation of evidence and argument *only by* CSXT, [NSR], and Amtrak”. . . . (Port Letter at 1-2 (emphasis added).) The Port did not move to intervene or seek any other leave of the Board to participate as a party. On October 20, 2021, Amtrak filed a motion to clarify that the Port may not further participate in this proceeding without first seeking and being granted leave of the Board. That motion remains pending. The Port subsequently filed *both* “Opening Evidence” on November 3, 2021 and “Reply Comments and Evidence” on December 3, 2021.

Under 49 U.S.C. § 24308(e), the Board is only required to consider whether and to what extent the *Gulf Coast* service will “impair unreasonably freight transportation *of the rail carrier, with the rail carrier* having the burden of demonstrating that the additional trains will impair the freight transportation.” *Id.* (emphasis added). Section 24308(e) does not contemplate the interest of any other party, including the interests of parties that may use or cross a rail carrier’s tracks. Here, the rail carriers are CSX and NS, not the Port. Indeed, the Port is a switching and terminal carrier and does not own any rails along the *Gulf Coast* service.¹ Consequently, the Port has no statutory role in presenting evidence in this proceeding² and any attempt to do so should be disregarded.

¹ See Terminal Ry. Alabama State Docks—Temporary Trackage Rights Exemption—Norfolk S. Ry. Co., Docket No. FD 36190 (STB served May 11, 2018).

² See 49 U.S.C. § 24308(e). For similar reasons, an individual could not submit evidence for the Board to consider regarding whether his vehicle may be held at a crossing for longer than he otherwise might due to Amtrak’s *Gulf Coast* service. The statute requires the Board to assess whether resumption of the *Gulf Coast* service will impair unreasonably freight transportation, and freight transportation only.

Similarly, because the Port is not a party to this proceeding, the Port is not entitled to participate as a party absent leave of the Board. The Board’s regulations explicitly define a “party” as “a complainant, defendant, applicant, respondent, protestant, intervener, 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). Importantly, the definition of party does “not include persons merely signing certificates of support” and the regulation specifically states 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.* Thus, even though the Port is designated as a “party of record” on the Board’s docket service list and has filed letters of support for CSX and NS, the Port has not sought or been granted actual party status under the Board’s regulations. The Port’s failure to properly seek leave of the Board—or to otherwise move for intervention³—precludes the Port from presenting any comments or evidence to the Board at this time.⁴

CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Board strike the Port’s “Opening Evidence” as well as its “Reply Comments and Evidence” from the official evidentiary record of this proceeding and disregard these filings.

³ The Port has not attempted to make the required showing for intervention as a party under either 49 C.F.R. § 1113.7 or 49 C.F.R. § 1112.4. And, even though the Port asserted in its October 8, 2021 letter that its intervention as a party “is warranted,” the Port has not formally moved to intervene and has failed to meet the applicable standards for intervention under 49 C.F.R. § 1113.7(a).

⁴ Although the Port is not permitted to seek comments or evidence at this time, it has already “filed comments at earlier phases of this proceeding” (Port Letter at 1) and has thus not been “foreclose[d]” from “participat[ing] in this proceeding.” The Port should not be allowed to take multiple bites of the apple.

December 6, 2021

Respectfully submitted:

/s/ Jessica Ring Amunson

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day served copies of this document upon all parties of record in this proceeding, by email on the service list to Finance Docket No. 36496.

December 6, 2021

/s/ Jessica Ring Amunson
Jessica Ring Amunson