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EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

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

AMTRAK'S RESPONSE TO BOARD QUESTIONS

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In its decision of March 14, 2022, the Surface Transportation Board (“the Board”) directed the parties to be prepared to address certain issues at the evidentiary hearing scheduled to begin on April 4, 2022. Because some of these questions require explanation at a level of detail that may not be possible to reach during the compressed timeframe of the hearing, Amtrak is offering this written response in advance of the hearing. Counsel for Amtrak will be prepared to discuss this response further with the Board at the hearing. In addition, the parties have conferred and respectfully request that the Board allow the parties until April 15, 2022, to respond to any filing or argument offered by any party on these issues.

QUESTIONS AND RESPONSES

1. On February 18, 2022, in response to a request from the Board at the prehearing conference, Amtrak filed under seal copies of its operating agreements with CSXT and NSR. How do the agreements apply to the matters in dispute in this case and what, if any, steps have been taken by the Parties pursuant to the agreements? Are any additional steps contemplated to be taken by any of the Parties pursuant to these agreements?

Application of Parties’ Operating Agreements and Steps Taken Pursuant to those Agreements. Section 3.2A of Amtrak’s Operating Agreement with CSX and Section 3.2 of Amtrak’s Operating Agreement with NS are the provisions by which Amtrak has been attempting to restore service to the Gulf Coast for several years. To that end, in January 2020, Amtrak entered

into an RTC Study Agreement and a Data Sharing Agreement with CSX and NS in which the parties agreed that a Rail Traffic Controller (‘RTC’) analysis would provide useful input for the reintroduction of the Proposed SRC Amtrak Service in accordance with the terms of Section 3.2A of the CSXT Operating Agreement and Section 3.2 of the NSR Operating Agreement. However, as the Board is aware, the RTC Study agreement expired in January 2021 without the study having been completed. This effort was significantly handicapped because CSX and NS refused to share with Amtrak vital information about the data and assumptions used in the RTC Study. While CSX and NS claimed that this refusal to share was based on the commercial sensitivity of the information, [REDACTED]

[REDACTED]

[REDACTED]¹ [REDACTED]

[REDACTED]

[REDACTED]² [REDACTED]

[REDACTED]

[REDACTED]³

After the termination of the RTC Study, Amtrak sent letters to both CSX and NS on January 27, 2021, formally requesting that CSX and NS agree to Amtrak’s restoration of the Gulf Coast service beginning on or about January 1, 2022. As set forth under Section 3.2A of the CSX Operating Agreement and Section 3.2 of the NS Operating Agreement, which govern payment for “Modified or Additional Service,” Amtrak proposed that the payments for the service be in accordance with Section 5.1.B of the CSX Operating Agreement and Section 5.1(b) of the NS

¹ Ex. 1, NSR-00026182 [CONFIDENTIAL].

² Ex. 2, CSX_AmtrakGC_0025284 [CONFIDENTIAL].

³ Ex. 3, Blair VS, App. J. [CONFIDENTIAL].

Operating Agreement, which proposed payments “corresponded to those” provided for initial service. Both Section 5.1.B of the CSX Operating Agreement and Section 5.1(b) of the NS Operating Agreement provide that if CSX or NS consider the method of payment for additional or modified service to differ in any significant degree from the basis of the payment used for the initial service, then they shall seek relief from the National Arbitration Panel. However, if they do seek such relief, CSX and NS must allow Amtrak to operate the additional or modified service according to either the amount proposed by Amtrak or an interim amount set by the National Arbitration Panel while the matter is pending before the Panel. Neither CSX nor NS have applied to the National Arbitration Panel for relief. And, of course, CSX and NS continue to deny Amtrak the ability to operate the *Gulf Coast* service.

Additional Steps Contemplated under the Operating Agreements. Amtrak anticipates that over time, it will take additional steps under the Operating Agreements to work with CSX and NS to make infrastructure improvements on the *Gulf Coast* line. As reflected in the record, there are already more than \$60 million in capital funds dedicated to restoration of the *Gulf Coast* service. The Gulf Coast Working Group Report recommended that certain capital improvements be made on the line over time to enhance the reliability of the *Gulf Coast* service and reduce passenger trip time. If Amtrak were to request that a particular capital improvement be made on the *Gulf Coast* line, Amtrak would ask that CSX or NS undertake those improvements pursuant to Section 4.3 of the CSX and NS Operating Agreements, which provides that Amtrak has the right to ask CSX and NS to improve their rail lines at Amtrak’s expense. Amtrak would then separately contract with CSX and/or NS for these infrastructure improvements through either a construction agreement or through the Authorization Notice procedure as set forth in Section 5.1(h) of the NS Operating Agreement and Section 5.1 of the CSX Operating Agreement.

Importantly, the parties' Operating Agreements treat the cost of *constructing* capital improvements entirely differently from the cost of *maintaining* such capital improvements. As noted above, capital costs are contracted for separately by construction agreements or Authorization Notices. For example, Amtrak and CSX recently agreed on an Authorization Notice for the installation of new rail on CSX's Bridge Branch at a capital cost of approximately \$842,000 in support of Amtrak's operations in New York State. However, maintenance costs are accounted for as part of the incremental cost payments that Amtrak already has negotiated with CSX and NS. Accordingly, once the *Gulf Coast* service is restored, Amtrak would make those existing incremental cost payments to CSX and NS, as was set forth in Amtrak's January 27, 2021 letters to both CSX and NS.

2. Do the terms of section 5.1E of Amtrak's agreement with CSXT and the similar terms of section 5.1(e) of Amtrak's agreement with NSR apply to Amtrak's application in this proceeding?

No. This is a proceeding under Section 24308(e) where Amtrak already has Operating Agreements in place with both CSX and NS that set the terms of compensation, including compensation for additional or modified services requested by Amtrak. As Section 5.1E of the CSX Operating Agreement and Section 5.1(e) of the NS Operating Agreement make clear, CSX and NS would have to initiate a proceeding before the Board under Section 24308(a) for a redetermination of compensation. CSX and NS have not done so.

3. If the Board were to determine that CSXT and NSR failed to demonstrate that the additional trains as proposed by Amtrak would "impair unreasonably freight transportation," see 49 U.S.C. § 24308(e)(2)(A), and the Board ordered CSXT and NSR to provide or allow for the operation of the additional trains, may the Board, in accordance with § 24308(e)(3), also require the construction of additional infrastructure under its authority to

“prescribe reasonable terms and compensation for using the facilities and providing the services” pursuant to § 24308(a)?

No. Section 24308(e)(3) directs the Board to decide the dispute under Section 24308(a) *only* in those circumstances where the parties do not already “have an agreement that establishes the compensation Amtrak will pay the carrier for additional trains provided under an order under this subsection.” 49 U.S.C. § 24308(e)(3). Here, the parties already do have such an agreement. As described above, Section 5.1.B of the CSX Operating Agreement and Section 5.1(b) of the NS Operating Agreement constitute the parties’ agreement regarding the compensation for any modified or additional services that are requested by Amtrak under Section 3.2. In accordance with these contractual provisions, Amtrak proposed to provide such compensation in its January 27, 2021 letters to both CSX and NS. Neither CSX nor NS have ever taken issue with the compensation Amtrak has proposed to provide for operating the service nor suggested that the compensation that Amtrak will pay them for the additional trains Amtrak has requested is not governed by the parties’ existing Operating Agreements.

Accordingly, if the Board were to determine that CSX and NS failed to demonstrate that the additional trains as proposed by Amtrak would “impair unreasonably freight transportation” and the Board ordered CSX and NS to provide or allow for the operation of the additional trains, the Board could not then also require the construction of additional infrastructure under its authority to “prescribe reasonable terms and compensation for using the facilities and providing the services” pursuant to Section 24308(a) because Section 24308(a) would never become applicable in these proceedings, which are being conducted under Section 24308(e). In other words, the Board would never get to deciding “terms and compensation” under Section 24308(a) because Section 24308(e)(3) says that the Board must abide by the parties’ existing agreements,

in which the parties already explicitly contemplated and provided for the terms and compensation for additional trains in Section 5.1B (CSX) and Section 5.1(b) (NS).

If the Board determines that CSX and NS failed to demonstrate that the additional trains as proposed by Amtrak would “impair unreasonably freight transportation,” the proper course would be for the Board to order CSX and NS to provide or allow for the operation of the additional trains immediately. Of course, the Board could also recognize that Amtrak has pledged to work with CSX and NS to make infrastructure improvements over time, such as those recommended by the Gulf Coast Working Group, that will improve the safety and reliability of both passenger and freight rail and reduce trip times, including with the more than \$60 million in capital funds already dedicated to this purpose. Moreover, the Board could note that if Amtrak fails to live up to those commitments, Congress has provided CSX and NS with recourse. If, once the service is up and running, CSX or NS believes that providing Amtrak with preference to use their rail lines for the *Gulf Coast* service is materially lessening the quality of the freight transportation they are able to provide to shippers, CSX or NS can always apply to the Board for relief under Section 24308(c). Or if on-time performance becomes an issue, CSX and NS can request a Board investigation under Section 24308(f)(1) to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by Amtrak. CSX and NS are not without options once the Board orders service restored.

But Congress did not contemplate that Board-ordered infrastructure improvements would be part of the streamlined and expedited process Congress established in Section 24308(e). In fact, Congress enacted the statute precisely because the host railroads were making inordinate demands for infrastructure improvements as a condition of operating passenger rail service, which was delaying Amtrak from adding service. Section 24308(e) was meant to provide an expedited

procedure for Amtrak to get service up and running, as is clear from the 30-day and 60-day timeframes set forth in the statute and as is emphasized repeatedly in the statute's legislative history. Section 24308(e) does not authorize the Board to order capital expenditures. Instead, Section 24308(e) authorizes the Board to simply issue "an order requiring the carrier to provide or allow for the operation of the requested trains" on "a schedule based on legally permissible operating times." And Section 24308(e) recognizes that the existence of the Operating Agreement, prescribing the terms and compensation for additional service, would be the basis upon which the parties implement that service.

4. *If the Board were to find that CSXT and NSR demonstrated that the additional trains as proposed by Amtrak would "impair unreasonably freight transportation" without some measure of additional infrastructure, could the Board nevertheless order CSXT and NSR to provide or allow for the operation of the additional trains, subject to the construction of additional infrastructure determined by the Board, either under § 24308(a) or otherwise?*

Amtrak does not believe that CSX and NS have demonstrated or can demonstrate that the additional trains as proposed by Amtrak would "impair unreasonably freight transportation" without some measure of additional infrastructure. The original bargain Congress struck with the freight railroads in 1970, the statute that is issue in this case—49 U.S.C. 24308(e)—enacted in 1980, and the Passenger Rail Investment and Improvement Act of 2008, each and all necessarily contemplate that passenger service will have some impact on freight service. Congress clearly understood that running passenger service over freight carriers' rail lines would impact freight rail service and that giving Amtrak preference over freight transportation would affect freight service. Therefore, Congress could not have intended for mere "degradation" to freight service to bar Amtrak from operating passenger service over freight rail lines.

However, if the Board decides that CSX and NS have made such a showing, the Board nonetheless could order CSX and NS to allow for the service simply by making factual findings

holding that *if* Amtrak commits to making infrastructure improvements over time, then the additional trains would *not* impair unreasonably freight transportation. The Board presumably would order CSX and NS to cooperate with Amtrak in making such infrastructure improvements in a timely fashion in order to ensure Amtrak's access rights are not unreasonably delayed. But the Board need not resort to Section 24308(a) to make these findings. As explained above, Section 24308(a) is not implicated in these proceedings. The Board would simply hold under Section 24308(e) that an order requiring CSX and NS to allow for the operation of the requested trains would not impair unreasonably the freight transportation of CSX and NS because there would be no such impairment provided that CSX and NS timely cooperate with Amtrak on the construction of additional infrastructure.

At the pre-hearing conference on February 16, 2022, the Board asked a similar question with respect to what would happen if the Board ruled that CSX and NS made a *prima facie* case of unreasonable interference and whether, in that circumstance, Amtrak would then bear the burden of defeating that *prima facie* case. But the statute is clear that the burden remains at all times on the freight railroads. As the statute provides: "The Board shall consider—(A)when conducting a hearing, whether an order would impair unreasonably freight transportation of the rail carrier, with the carrier having the burden of demonstrating that the additional trains will impair the freight transportation." 49 U.S.C. § 24038(e)(2)(A). The statute does not place any burden on Amtrak to come back with evidence of how that impairment might be mitigated. Moreover, the statute does not preclude the Board from ordering the carrier to allow for the operation of the requested trains *even if* the Board finds unreasonable impairment of freight transportation. The statute states that the unreasonable impairment inquiry is simply a "consider[ation]" for the Board, not a bar to ordering the service. The statute likewise directs that that Board "consider" whether

the schedule for the additional service will be consistent with the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort. 49 U.S.C. § 24038(e)(2)(B). Here, as Amtrak's witnesses will testify, the proposed *Gulf Coast* service is consistent with that statutory goal.

5. *If the Board were to order that CSXT and NSR provide or allow for the operation of additional trains and that additional infrastructure be constructed, may the Board, under § 24308(a), determine which party bears the cost of constructing which infrastructure projects or otherwise apportion the costs of additional infrastructure?*

Again, Section 24308(a) is not implicated in these proceedings because the parties already have existing Operating Agreements that set forth the terms and compensation for the additional service requested by Amtrak and therefore this dispute is governed by Section 24308(e)(3). If the Board's question is whether the Board has the authority to change the incremental costs payments that Amtrak makes to CSX or NS in order to account for capital construction costs, the answer is no for at least three reasons. First, those costs are a contractual matter between the parties and not subject to reopening except by the means explicitly set forth in the Operating Agreements. Second, those costs are meant to account for the maintenance of infrastructure, but not the construction of such infrastructure, which is handled entirely separately through project-specific construction agreements and Authorization Notices, as explained above. And third, as a statutory matter, there is no authorization in Section 24308(e) for the Board to *require* Amtrak to construct anything. Section 24308(e) does not give the Board any authority to order infrastructure or—unlike Section 24308(a)—to set terms and compensation to govern Amtrak's access rights. And Section 24308(e) most certainly does not authorize the Board to order infrastructure must be built *now* to address concerns about what might happen to freight traffic in *twenty years*.

Section 24308(e) simply charges the Board with determining whether additional passenger trains will unreasonably impair current freight traffic. CSX and NS have already admitted that the *Gulf Coast* service will not unreasonably impair their current freight traffic, stating in a recent filing that they do not dispute that “there is sufficient theoretical capacity on the Gulf Coast Corridor to accommodate the passenger trains” and that “passenger trains can be added in 2019 without causing the corridor to grind to a halt.” CSX/NS Surrebuttal Resp. Br. at 4 (Feb. 24, 2022). That should be the end of this case.

CONCLUSION

Amtrak looks forward to further discussing these issues with the Board at the evidentiary hearing and to responding to the other parties’ filings on these issues by April 15, 2022.

April 1, 2022

Respectfully submitted:

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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.

April 1, 2022

/s/ Jessica Ring Amunson
Jessica Ring Amunson

Exhibit 1

NSR-00026182

[CONFIDENTIAL]

REDACTED

Exhibit 2

CSX_AmtrakGC_0025284
[CONFIDENTIAL]

REDACTED

Exhibit 3

Blair VS, App. J.
[CONFIDENTIAL]

REDACTED