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BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36496

APPLICATION OF THE NATIONAL PASSENGER RAILROAD CORPORATION UNDER
49 U.S.C. § 24308(E)—CSX TRANSPORTATION, INC., AND NORFOLK SOUTHERN
RAILWAY COMPANY

**ALABAMA STATE PORT AUTHORITY AND TERMINAL RAILWAY ALABAMA
STATE DOCKS' SUPPLEMENTAL EVIDENCE AND ARGUMENT**

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**ATTORNEYS FOR ALABAMA STATE
PORT AUTHORITY AND TERMINAL
RAILWAY ALABAMA STATE DOCKS**

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In keeping with the Orders of the Surface Transportation Board (the “Board”) served in the above-referenced proceedings on May 17 and July 11, 2022, and the Board’s comments at the close of the (possibly initial) trial phase of this proceeding on May 12, 2022, the Alabama State Port Authority (“ASPA”) and its rail common carrier operating division, Terminal Railway Alabama State Docks (“TASD”) – collectively, the “Port” – hereby tender brief supplemental evidence and argument (“Supplement”) in this proceeding. The Supplement bears upon whether or not the Board should grant the application of the National Railroad Passenger Corp. (“Amtrak”) to compel CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) to provide for the commencement of Amtrak passenger service between Mobile and New Orleans (the proposed “Gulf Coast Service”) under terms and conditions demanded by Amtrak. The Port has had no choice but to join in this proceeding, given the unreasonable impairment to freight service that would result from Amtrak’s current proposal, a product of Amtrak’s exceedingly callous indifference to the Port, and, by extension, the State of Alabama, generally, and the Port’s operations at Mobile.

The Port offers this Supplement to address whether or not T ASD could adjust its Mobile terminal operations to avoid operational impacts (delays, generally, to T ASD operations across the CSXT corridor in Mobile that Amtrak also wants to use). The Port does so in response to Amtrak allegations leveled more directly against CSXT and NSR than against the Port. The Port will also address the challenge of arriving at, and then determining how best to apply, a clear standard or measure for what constitutes unreasonable impairment of freight transportation under 49 U.S.C. § 24308(e) per the statute's specific, undefined term.

A principal Amtrak criticism of the freight carriers is that they have, allegedly, insisted upon Amtrak-funded, freight-service-protecting infrastructure as a precondition to the commencement of Gulf Coast Service without exploring whether the freight carriers reasonably could modify their operations to reduce, or eliminate, such infrastructure expenses. Echoing this criticism, Chairman Oberman expressed concerns about whether the freight carriers had done enough to look at operational adjustments before pressing the need for infrastructure mitigation (any of which, incidentally, Amtrak has refused to offer). The Port takes no position on this issue as it bears upon the evidence supplied by CSXT and NSR. But the Port will take this opportunity to clarify that T ASD is predominantly a first-mile/last mile terminal operator, and that T ASD's operations are heavily dependent upon – (a) the service demands of its customers and connecting line-haul carriers; and (b) CSXT discretion in allowing T ASD onto, and over, CSXT main line trackage in the Mobile Terminal. As such, the idea that T ASD has any true flexibility to adjust its operations to better accommodate Amtrak and avoid freight service impacts on its system are unfounded.

For these and other reasons set forth in the attached supplemental verified statement of Robert M. Golden, the sort of operating adjustments that Amtrak seems to think a

carrier like T ASD can undertake to avoid freight service disruption reveal just how badly out-of-touch Amtrak is when it comes to freight operations in terminal areas like Mobile, and how little it understands about how Amtrak's operations would impact interstate commerce. Amtrak's suggestion that T ASD could adapt its operations to accommodate Amtrak ignores the fact that T ASD does not, and cannot, control the service needs of its customers or its freight carrier partners, including CSXT, over whose lines T ASD has absolutely no control. See, generally, Supplemental Verified Statement of Robert M. Golden (attached). But the Port would observe, also, that Amtrak and its experts have recognized that there is little, if anything, that T ASD could do to adjust its operations in response to the initiation of Amtrak service without harming customers and interline partners (neither of which T ASD reasonably could control or require to change their own service expectations). Indeed, if Amtrak or its experts thought T ASD reasonably could make operating adjustments, then they could have, and should have, offered specific examples to prove the allegation, but they haven't.

As reflected in the May 12, 2002 remarks of the Chairman, the Board has struggled with interpreting and assessing how to apply Section 24308(e)(2)(A)'s "unreasonable impairment" standard, noting that Congress did not define the term. The Board's frustration triggered comments that – (a) the definitions offered by disputants were largely circular and unsatisfactory; and (b) freight service impairment presentations would have been better made if they had been supported by customer-supplied evidence of service disruption impact (and the scope of such impact). The Port agrees that suitably defining the term will not be easy, particularly given the highly-charged circumstances here, and the Board's general mandate under the Administrative Procedure Act to avoid adopting arbitrary and capricious standards.

But, ultimately, Congress has entrusted the Board to interpret and apply the statute, and has done so because the Board is presumed to be vested with requisite expertise to arrive at standard where none has been supplied. Of course, what may constitute “unreasonable impairment” is as yet unclear (better if the Board had articulated a standard at the outset of the proceeding), and, worse, Congress provided a poor road map for resolving the competing service issues at play. Consider the following elements of Section 24308(e):

- After Amtrak files an application, the Board must decide whether or not to hold a hearing on the record. In fact, *that is the only decision that Section 24308 ever specifically mandates* – a ruling on whether or not to hold a hearing, and, if the Board opts against a hearing, then the Board must explain its decision. The statute provides no guidelines for when the Board should opt one way or the other on holding a hearing, only that the agency must give its reasons if there won’t be one. The statute also does not say what reasons would be appropriate.
- If the Board elects to hold a hearing on the record (and, evidently, the Board need not provide any reasons for choosing that path), then, at the conclusion of that hearing, the Board “may” (Section 24308(e)(1)) grant Amtrak’s request. To this point, the statute compels no particular outcome based on any given evidence.
- If the Board opts for a hearing on the record, as it has done here, then the Board “*shall consider . . . whether an order would impair unreasonably freight transportation of the rail carrier,*” adding that the carrier has “the burden of demonstrating that the additional trains will impair^[1] the freight transportation.”

¹ The statute is frustratingly-inconstant in its phrasing in Section 24308(e)(2)(A). On the one hand, the Board is to *consider* whether the order would impair *unreasonably* freight transportation *of the rail carrier* – an analytical, reflective task clearly assigned to the Board. On the other hand, “the carrier” must prove that Amtrak’s proposal “will impair the freight transportation” – no mention of *unreasonable* impairment, and no clear indication whether Congress intended for the evidence on impact to be limited to that confronting “the carrier” alone. Under this statutory phrasing, and applying general principles of statutory construction where word selection and omission have meaning, the statute reads to require only that the “freight carrier” prove “impairment” (absent any qualifying language about the potential degree of such impairment). If Congress had intended the second reference to “impair” in Section 24308(e)(2) to mean the same as “impair unreasonably,” it could have accomplished its objective definitively by repeating the phrase “impair unreasonably” (rather than employ the unqualified term “impair”), or Congress could have accomplished the same purpose with use of the phrase “so impair” in place of “impair.” But, given the actual phrasing, whether carrier-proven impairment is “unreasonable” seems to be up to the Board. The statute does not explicitly require that “the carrier” establish what unreasonable impairment is.

Section 24308(e)(2)(A). Also, Section 24308(e) does not restrict the Board's analysis to freight transportation impacts only. Indeed, it would make eminent sense for the Board to consider also, the potential ramifications of granting the application with respect to freight carrier rights under 49 U.S.C. § 24308(c), as the agency has previously observed during the course of this proceeding.

- If the Board were to hold that “the carrier” has failed to prove that freight transportation will be impaired, the Board *may* (not *must* or *shall*) order the access that Amtrak seeks. For that matter, even if *the Board* were to find that the requested order would impair freight transportation *unreasonably*, Section 24308(e) does not clearly state that the application must be denied, even if that could be a reasonable inference – the statutory phrasing conveys no explicit decisional mandates. Nothing compels the Board to issue an order in favor of Amtrak under any circumstances.

These issues – arriving at a definition of “unreasonable impairment” and clearly delineating the steps the Board may or would take upon reaching a finding on unreasonable impairment (including whether to grant or deny an application, or, for that matter, to direct some other middle path) – may have been better examined within the scope of a formal rulemaking. The Federal Railroad Administration, for example, had promulgated rules following formal notice and comment when it was entrusted to administer Section 24308(e). And while a rulemaking may have delayed action on Amtrak's Gulf Coast Service initiative, it undoubtedly would have provided clearer rules of the road than Congress managed to provide – here and in any other case going forward. After all, Amtrak's characteristic impatience and sense of entitlement do not count for everything.

Indeed a rulemaking would have been a more facilitative method to consider and account for customer impact as part of the Board's unreasonable impairment consideration under the statute. Again at the conclusion of the initial trial phase on May 12, the Chairman indicated that he considered the absence of definitive evidence of shipper harm to be an evidentiary shortcoming. For its part, the Port *has* attempted to secure evidence from its various customers, but quickly has learned that they are exceedingly reluctant (and unwilling) to do so, not because

they are unconcerned, but rather for a variety of reasons including some or all of the following (among others): (a) the highly-politicized nature of the current dispute, pitting freight carriers against Amtrak and a woefully one-track-minded Department of Transportation; (b) concern over the prospect of having to make statements against interest regarding potential harm that would impair investment or raise other such problems for customers that are part of publicly-traded companies; (c) uncertainty about how, exactly, Port service will be impacted; and (d) the reality that, if the Port were to convince customers that service would decline markedly (and that, if the Board were to allow that to happen in favor of Amtrak), those same customers would likely shift to utilization of other Gulf Coast Ports. To be sure, the Port has tried, but it is a difficult undertaking when the RTC modeling (even if undertaken without incident or dispute) simply does not, and cannot, demonstrate with much detail precisely how a given TASD service would suffer, and how consistently such adverse impacts would arise.

A rulemaking, on the other hand, would have removed the issue from the scope of a pending dispute, and would allow for a participation of far-broader groupings of shipper interests and trade associations.

But adverse shipper impact does not by itself encapsulate, and is far from a definitive measure for, freight transportation impairment, unreasonable or otherwise. Indeed neither the word “shipper” nor the word “customer” appears in Section 24308(e). Whether Amtrak trains would trigger freight service delays or unreliability that would rise to the subjective level of being unacceptable, Amtrak service – on any route – clearly has an impact on freight transportation. That is, freight carriers must accommodate Amtrak trains as a matter of federal law, generating freight carrier inconvenience, at a minimum, and service disruption in many other cases (absent collective efforts to address capacity issues). Here, the RTC model

(and indeed Amtrak's alternative capacity analysis itself) points to far more than inconvenience. The evidence shows that the Mobile terminal will lack sufficient capacity to take on Amtrak's trains, given Amtrak's refusal to do anything about that. Indeed, the RTC model shows that TASD trains will suffer anywhere from a 33.6% to a 66.5% increase in train delays and a corresponding 22.1% to a 50.1% increase in service variability. CSXT/NSR Opening Evidence, November 3, 2021, Exhibit 2 (Verified Statement, Banks/Guthrie), Appendix A Gulf Coast Passenger Service RTC Modeling Report (Dingler/Guthrie). The Port respectfully submits that if the Board were to conclude that the inefficiencies to TASD operations as reflected in the RTC modeling do not show Amtrak-caused unreasonable impairment to TASD's freight transportation, it would be hard to guess what *would* cross the Board's threshold.

Returning to the particulars of shipper impact, while such evidence could be helpful as *one indicia* of unreasonable impairment, focusing solely or primarily on such evidence is no way to protect the public interest, and, indeed would ignore many other elements of the Rail Transportation Policy of 49 U.S.C. § 10101 that the Board should protect, if not advance. Whether or not Amtrak-triggered freight service inefficiency would cause TASD shippers to suffer meaningful service degradation is one thing. But, at a minimum, these projected inefficiencies (as garnered from the RTC modeling analysis) inescapably would increase TASD's operating costs (increased car hire, labor and fuel costs), and could force the Port to undertake off-corridor infrastructure expansion to compensate for reduced (and less reliable) access to the CSXT main lines in Mobile. In turn, TASD would have to absorb these additional, Amtrak-induced operating costs (arguably a form of a freight carrier cross-subsidy to Amtrak cross-subsidy or a federal taking of freight carrier resources without compensation or both), or it would pass those costs along, in whole or in part, to its customers.

For these reason, if the Board were to focus primarily or exclusively on shipper-supplied evidence of what constitutes unacceptable service, particularly in the limited context of this proceeding, it will have overlooked other key elements of freight transportation, including, most notably the cost of freight transportation.

CONCLUSION

The record evidence overwhelmingly demonstrates that Amtrak's Gulf Coast Service (as proposed) would unreasonably impair railroad freight transportation along the proposed passenger service corridor, and, as such, the Board must, under its limited authority under Section 24308(e), deny the Application.

Respectfully submitted,

/s/ *R. A. Wimbish*

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**ATTORNEYS FOR ALABAMA STATE
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RAILWAY ALABAMA STATE DOCKS**

Dated: July 27, 2022

SUPPLEMENTAL VERIFIED STATEMENT OF ROBERT M. GOLDEN

My name is Robert M. Golden. I am General Manager of the Terminal Railway Alabama State Docks (“TASD”) in Mobile, Alabama. My background and qualifications to submit this supplemental verified statement are detailed in my verified statement appended to the Opening Comments and Evidence of the Alabama State Port Authority and TASD (collectively “the Port”), incorporated herein by reference, and in my oral testimony offered during an earlier phase of this proceeding. *See, e.g.*, Port Opening Comments and Evid., Ex. B, V.S. of Robert M. Golden, Nov. 3, 2021 (“Opening V.S.–Golden”), at 1.

I am offering this supplemental testimony to address the assumption of the National Railroad Passenger Corporation (“Amtrak”) that the freight railroad carriers in Mobile are capable of, and should, adjust their own operations to accommodate Amtrak’s proposed *Gulf Coast Service*. *See, e.g.*, Amtrak’s Reply Arg. and Evid., Dec. 3, 2021, at 34 (describing the freight carriers’ “refusal” to “consider whether operational efficiencies might alleviate some of the impacts” of Amtrak’s proposed service). As I will explain, there are a number of factors beyond TASD’s control which preclude TASD from implementing such so-called “operational efficiencies” to work around Amtrak’s proposed service schedules and reduce Amtrak’s impacts on TASD’s operations. In sum, Amtrak is unaware of TASD’s operational interdependence with other carriers, and of the schedule-sensitive nature of our first-mile, last-mile services.

It is wrong to assume that TASD can somehow adjust its operations to avoid the freight service disruption which Amtrak’s operations otherwise would cause. TASD is a first-mile, last-mile carrier whose operations must be responsive to the requirements of its customers and to accommodate the operations of TASD’s interline rail carrier partners. TASD is in no position to adjust its freight operations for the benefit of *Gulf Coast Service* trains because it must respond

to the needs of others. “Operational efficiencies” here means that TASD would be dictating to its customers and the other carriers how their own operations must be conducted—a textbook example of putting a cart before its horse. For reference, this supplemental verified statement will provide examples illustrating this issue by discussing three different operating zones at the Port of Mobile: McDuffie Island, the Intermodal Container Transfer Facility (“ICTF”), and Riverfront Yard.

MCDUFFIE ISLAND

TASD’s operations at the McDuffie Island coal terminal are not—and cannot be—set to a fixed schedule. Instead, they are coordinated between the colliers and the operators who serve them. Each day at 8:30 a.m., there is a conference call during which coal customers, Port staff at McDuffie Island, CSX Transportation, Inc. (“CSXT”), and TASD establish the day’s traffic plan, with updates to that plan circulated via e-mail three times daily. This ensures the fluidity of operations at McDuffie Island—fluidity which requires continuous adjustments to the operating plan. Maintaining this fluidity is critical to maintaining the reliability of rail-to-ship service at Mobile. Requiring TASD to adjust its operations would require in turn that TASD dictate to its coal customers when service will be provided at McDuffie Island, rather than remaining flexible enough to accommodate those customers and the ships calling at McDuffie Island. Not only does the execution of the daily operating plan require careful, repeated coordination, but in the end, it is intended to be fluid so that the Port’s coal facilities may attract and maintain business by being responsive to customer needs. Were TASD to lose that flexibility for the sake of Amtrak’s trains between New Orleans and Mobile, it would follow quickly that the Port would risk losses to our coal traffic, and the anger of our coal customers, and the displeasure of the line-haul carriers, who all depend on TASD’s swift, efficient, and flexible service.

Colliers cannot dock unless their coal is already on the ground, or on a train spotted at the coal terminal, for transfer. Coal trains arriving over CSXT's main line from north of Mobile must pass through the interlocking plants at CP Alabama State Docks and CP Choctaw to reach McDuffie Island, and coal trains arriving over lines of the BNSF Railway Company ("BNSF") and Norfolk Southern Railway Company ("NSR") must travel over TASD's lines and then over CSXT's lines through those same interlocking plants. Opening V.S.–Golden, at 3-4. In addition, coal trains arriving over the Canadian National Railway ("CNR") line must cross CSXT's main line at CP IC Interlocking to travel to and from the coal terminal. *Id.*, at 3. Once export coal trains have been emptied and their loads transferred to the colliers, they must be doubled and pulled out to make room for more inbound trains. Again, these trains move over CSXT to central and northern Alabama, over CSXT back to TASD's interchanges with BNSF and NSR, or cross CSXT's diamond to return to the CNR. *Id.*, at 7.

All of these operations are dictated by the needs of the coal customers and by CSXT's control of the interlocking plants. TASD cannot adjust these operations because it does not control the colliers or the interlockings. TASD handles coal shipments to or from McDuffie Island (traversing the CSXT-controlled railroad infrastructure over which Amtrak now proposes to operate) when our customers require, and in turn, when CSXT allows. Attempting to adjust these operations at TASD's discretion to accommodate Amtrak—or insisting that CSXT do so on its behalf via its control of the interlocking plants—is simply impossible, and harmful to our customers. Imposing a fixed schedule on these operations—or insisting that CSXT guarantee certain windows of time for the movement of coal trains through its interlocking plants—would not resolve this issue, because the coal trains might need to move at any time of day according to the colliers' needs. Likewise, setting fixed windows of time for the movement of traffic through

the interlocking plants would reduce the fluidity of the coal terminal itself. It would be counter to the Port's focus on customer service, and counter to the Port's position in the Gulf Coast coal transportation market, to convey to our customers that their service needs must suffer in the interests of accommodating Amtrak's passenger trains.

INTERMODAL CONTAINER TRANSFER FACILITY

Likewise, TASD is in no position to adjust its operations to and from the ICTF. As with the McDuffie Island coal service, TASD does not dictate the schedule of trains running into and out of the ICTF, but must respond to the requirements of connecting line-haul freight carriers, and, in turn those line-haul carriers' customers. However, unlike McDuffie Island, there are certain operational constraints with respect to the ICTF. Traffic to and from the ICTF is currently coordinated with Illinois Central Railroad Company ("IC"), in accordance with IC's network requirements and pickup and delivery schedules at IC's intermodal ramps in Memphis and Chicago. *Id.*, at 8. TASD must plan its ICTF movements around IC's southbound arrivals at 8:00 p.m. and northbound departures at 5:00 a.m. each day, locking these movements into definite windows during which connecting traffic must move to make its connections on other parts of the IC system.

CSXT and NSR will be introducing new intermodal services connecting the ICTF and inland intermodal terminals at McCalla and Montgomery, Alabama, respectively, during the next two years. Port Opening Comments and Evid., Ex. A, TASD Historic R.R. Vol. Data, Nov. 3, 2021, at 21. As with IC's trains, these CSXT and NSR trains will move according to network and customer service requirements, and TASD's train movements to and from ICTF must accommodate CSXT and NSR schedules (which, again, are shaped by customer need), and not the other way around. The idea that TASD could insist that CSXT, NSR, and their intermodal

service customers accommodate TASD's operating preferences in order to avoid Amtrak-related service disruption is a sure way for TASD (and perhaps the Port) to lose this new business. That is something which TASD, as a first-mile, last-mile carrier, cannot afford to do.

RIVERFRONT YARD

TASD's operations at Riverfront Yard revolve around the movement of traffic to and from Interchange Yard, switching the customers located along the Mobile River waterfront, and moving rail traffic to and from the CG Railway, LLC ("CGRL") ferries sailing between Mobile and Mexico. Opening V.S.–Golden, at 3. Traffic crossing the corridor between the Interchange Yard and Riverfront Yard moves through interlocking plants controlled by CSXT. *Id.*, at 4. This traffic consists of lengthy blocks of grain and merchandise traffic which consume a lot of yard capacity and so must be moved at every available opportunity to prevent traffic gridlock. *Id.*, at 6. With CSXT's control of these interlockings, TASD must maintain enough flexibility to move across the corridor when it can, likewise precluding adjustment to its train operations.

As with coal terminal operations at McDuffie Island and intermodal operations at ICTF, TASD cannot dictate terms to the customers and other carriers who rely on service at Riverfront Yard, but instead must respond to their needs to keep existing business and secure new traffic opportunities for the Port. TASD's customers will have little patience with TASD if we were to tell them that their service requirements must adapt to account for Amtrak. As most small railroads do, we endeavor to operate when our customers need the service.

Customer facilities along the waterfront typically only load and unload goods during daylight working hours, due to the contractual and labor requirements those customers have with their stakeholders. This means TASD must spot all of the traffic for these customer facilities no later than 7:00 a.m., for the stevedores to unload during the day, and then pull released cars after

5:00 p.m., after the stevedores have finished for the day. T ASD cannot dictate to the stevedores, and, even if it did, we would expect our customers to “vote with their feet” and move their traffic to other, more service-responsive ports along the Gulf Coast.

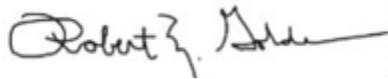
T ASD’s movements from CGRL’s slip are also determined by CGRL’s ferry schedules. *See id.*, at 6 (describing nature and quantity of rail ferry traffic). While a ferry is still out at sea, between ninety-six and seventy-two hours before its arrival in Mobile, CGRL will assign a time slot for the ferry’s arrival, the debarking of its load of freight cars, and the embarking of its next loads. These slots can vary widely, depending on factors as diverse as port requirements in Mexico, tides and weather conditions at sea, and contractual and labor agreements internal to the stevedoring companies who embark and debark the freight cars—none of which are within T ASD’s control. T ASD must serve the ferries when CGRL requires service, not dictate when CGRL can bring its ferries into Mobile for service.

CONCLUSION

The Port is not going out of its way to refuse implementing “operational efficiencies” to accommodate Amtrak’s *Gulf Coast Service* simply to gin up a basis for new infrastructure. Rather, the Port is faced with real constraints on operations. T ASD is a first-mile, last-mile carrier whose services revolve around, and must respond to, the requirements of the customers and the other rail carriers operating at Mobile. Accordingly, T ASD attempt to adjust its operations amounts to an attempt to dictate to customers and connecting carriers for the sake of Amtrak—a sure and certain recipe for unhappy shippers, frustrated interline carriers, and, ultimately, the loss of traffic to competing ports around the Gulf of Mexico.

VERIFICATION

I, Robert M. Golden, verify under penalty of perjury that I have read this verified statement on behalf of the Alabama State Port Authority and the Terminal Railway Alabama State Docks, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this verified statement on behalf of the Alabama State Port Authority and the Terminal Railway Alabama State Docks.



Robert M. Golden

Executed on July 26, 2022.

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of July arranged to serve the foregoing Supplemental Evidence and Argument of the Alabama State Port Authority and Terminal Railway Alabama State Docks upon all parties of record by electronic service or, where such service is not available, by U.S. Mail, postage prepaid.

/s/ *R. A. Wimbish*

Robert A. Wimbish