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PUBLIC VERSION

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Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

Re: Gulf Coast Passenger Service Between New Orleans and Mobile
STB Finance Docket No. 36496, Settlement Discussions

Dear Ms. Brown:

CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) submit the attached letter in response to certain questions and requests for information that the Surface Transportation Board (“Board”) made at the evidentiary hearing in the above-captioned matter relating to settlement efforts. Portions of this letter are designated Confidential under the Board’s April 13, 2021 protective order.

Background

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¹ Evidentiary Hearing Day 9, *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. and Norfolk S. Corp.*, STB Docket No. FD 36496 (May 9, 2022), Tr. 3377:20–3378:2. This and other transcripts were obtained from Ace-Federal Reporters, Inc. Copies of cited transcripts can be provided to the Board if the court reporter has not already provided them.

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At the conclusion of the evidentiary hearing on May 12, 2022, the Chairman indicated he would “still like some written representation of what happened there in the record.”⁷ This letter responds to that request in three parts. Part I provides some additional factual information {Redacted

Part II sets forth the relevant legal authority governing the inadmissibility of settlement discussions that were referenced during the evidentiary hearing by counsel for CSXT. And Part III argues that a neutral factfinder may not rely on information derived from press reports not introduced and admitted into evidence by a party to the litigation.

I. Description of CSXT’s Settlement Efforts.

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² *Id.* at 3378:12–17.

³ *See id.* at 3378:18–3379:19.

⁴ Evidentiary Hearing Day 10, FD 36496 (May 11, 2022), Tr. 3469:21–3470:18.

⁵ Evidentiary Hearing Day 11, FD 36496 (May 12, 2022), Tr. 3910:15–22.

⁶ *Id.* at 3911:1–5.

⁷ *Id.* at 4065:1–12.

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⁸ Evidentiary Hearing Day 8, FD 36496 (Apr. 19, 2022), Tr. 2999:12–3000:11; *see* 49 U.S.C. § 24712(l) (defining a “State” to include “a public entity that sponsors such operation on such a route”).

⁹ CSXT provides no comment on whether the dollar amount in the article is accurate.

II. The Content Of Settlement Discussions Are Not Admissible As Evidence.

The rules of evidence provide that “conduct or a statement made during compromise negotiations” “is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.” FED. R. EVID. 408(a), 408(a)(2). Rule 408 applies wherever there is an actual dispute or apparent difference of opinion between the parties as to the amount or validity of a claim, *see Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1306–07 (11th Cir. 1985), and wherever there are statements or conduct during negotiations relating to settlement of or compromise regarding that dispute, *see Trans Union Credit Info. Co. v. Associated Credit Servs., Inc.*, 805 F.2d 188, 192 (6th Cir. 1986) (noting that where parties had come together to discuss their respective interpretations of the contract and “how the two [parties] would proceed,” they were engaged in settlement talks).

Rule 408 is an *evidentiary bar*—it is not akin to attorney-client privilege, and thus not subject to mandatory waiver based on disclosure. *Alpex Computer Corp. v. Nintendo Co.*, 770 F. Supp. 161, 166 (S.D.N.Y. 1991), *on reconsideration*, No. 86-cv-1749, 1994 WL 139423 (S.D.N.Y. Mar. 18, 1994), *vacated in part*, No. 86-cv-1749, 1994 WL 381659 (S.D.N.Y. July 21, 1994) (rejecting comparison to attorney-client privilege, and noting that “[t]he issue of whether a party to a settlement agreement has publicized the existence or the terms of that agreement outside the context of the trial at hand does not enter into a court’s decision.”); *Ctr. for Auto Safety v. Dep’t of Just.*, 576 F. Supp. 739, 749 (D.D.C. 1983), *order vacated in part on reconsideration*, No. 82-cv-714, 1983 WL 1955 (D.D.C. July 7, 1983) (noting that Rule 408 “limits a document’s relevance at trial, not its disclosure for other purposes”). This is so even if some part of the discussions ends up in the press. *Alpex Computer Corp.*, 770 F. Supp. at 165–67 (noting and rejecting argument that Rule 408 protection is destroyed by press coverage).

Two policies animate Rule 408. First, the evidence Rule 408 excludes “is irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim.” *United States v. Contra Costa Cnty. Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982). Second, Rule 408’s exclusion of settlement negotiations as admissible evidence “is in promotion of the public policy favoring the compromise and settlement of disputes,” meaning that preventing settlement negotiations from being admitted encourages “full and open disclosure” in furtherance of settlement. *Id.*; FED. R. EVID. 408, Advisory Committee Notes to 1972 Proposed Rules (same).

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III. An Impartial Judge May Not Draw Or Rely On Facts From Materials Not In Evidence.

CSXT and NSR respectfully remind the Board that a tribunal conducting a hearing on the record may not rely upon alleged “facts” contained in materials that are not in evidence, particularly press reports.¹⁰ Under the Federal Rules of Evidence, a court may take judicial notice of facts that (1) are generally known in the court’s territorial jurisdiction, or (2) “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b). Press reports do not fall into that category. *See Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9. F.4th 247, 255 (5th Cir. 2021) (concluding that “newspaper articles . . . were not proper material for judicial notice” because “[i]t was not established that the accuracy of the articles could not be reasonably questioned, nor that the facts were ‘generally known within the’ district court’s jurisdiction”). The present situation underscores the reason for this rule. {

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¹⁰ CSXT and NSR direct the Board to Part III of their Memorandum on Proper Scope of Any Witness Examination In An On The Record Hearing filed April 6, 2022, for a more fulsome discussion of this principle.

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Respectfully submitted,

/s/ Raymond A. Atkins

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cc: FD 36496 Service List