

ENTERED
Office of Proceedings
May 31, 2022
Part of
Public Record

**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. AND NORFOLK SOUTHERN RAILWAY
COMPANY’S OPPOSITION TO AMTRAK’S MOTION TO COMPEL**

The National Railroad Passenger Corporation’s (“Amtrak’s”) Motion to Compel (“Motion to Compel”) would reopen discovery nearly eight months after the Surface Transportation Board (“Board”) closed discovery in this case. Contrary to Amtrak’s assertions, nothing in the Board’s decision holding open the evidentiary hearing record contemplates reopening discovery and doing so now would create severe delay and disrupt the reasonable order and resolution of the case.¹ Moreover, the interrogatories addressed to CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) reach far beyond the proper scope of supplemental discovery, and Amtrak has failed to articulate why they are reasonably likely to result in information relevant to the core concerns the Board

¹ See Decision, *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 (served May 17, 2022) (“May 17 Decision”) (holding open the evidentiary hearing record to allow each party an opportunity to submit supplemental evidence to address a list of concerns articulated by the Chairman on the record).

raised regarding Amtrak's case. At the evidentiary hearing on May 12, the Board made it clear that the most helpful course of action Amtrak could take would be to put forward an opposing RTC model based on the voluminous data CSXT and NSR produced to Amtrak months ago, with whatever modifications Amtrak and its outside experts feel is appropriate. Instead of focusing its attention on that reasonable task, Amtrak now seeks broad, wide-ranging, and irrelevant discovery that is patently unhelpful to the expeditious resolution of this case. The Board should deny Amtrak's motion.

I. AMTRAK'S UNTIMELY MOTION WOULD HAVE THE BOARD DEVIATE FROM ITS ESTABLISHED DISCOVERY PROCEDURES AND WOULD REQUIRE A LENGTHY EXTENSION OF THE PROCEDURAL SCHEDULE.

The Board should deny Amtrak's Motion to Compel as procedurally improper, untimely, and because reopening discovery will unnecessarily delay resolution of this matter. To start, Amtrak's Motion to Compel should have been filed with Administrative Law Judge Thomas McCarthy. The Board appointed Judge McCarthy "to entertain and rule upon discovery matters and to resolve initially *all* disputes concerning discovery in this proceeding."² Amtrak's Motion to Compel CSXT and NSR to respond to supplemental interrogatories is clearly a "dispute concerning discovery" and thus falls squarely within Judge McCarthy's purview given that the Board has not terminated or modified Judge McCarthy's role in this

² Decision, *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 (served August 6, 2021) at 12 (emphasis added).

proceeding. Judge McCarthy could make an initial determination as to the appropriateness of the requested discovery in light of the Board's previous decisions.

In any event, Amtrak's supplemental discovery is untimely. The Board's original procedural schedule provided that the "[d]iscovery period *ends*" on a date certain and made clear that "[a]fter the discovery period ends, the Board will not look favorably upon requests to pause the procedural schedule to resolve [discovery] disputes."³ The Board further instructed the parties to raise discovery issues "*as soon as possible within* the discovery period."⁴ Amtrak had a full and fair opportunity to participate in discovery and submitted broad discovery requests to CSXT and NSR. The parties exchanged a number of letters and participated in several discovery conferences before Judge McCarthy to resolve disputes over the sufficiency of productions and interrogatory responses. After a brief two-week extension to allow the parties to complete their review of all productions and privilege logs, discovery closed October 4, 2021. In his final discovery conference order, Judge McCarthy indicated that all disputes relating to the parties' discovery requests were settled.⁵ Discovery had undisputedly "end[ed]" and the Board

³ *Id.* at 11–12 (emphasis added).

⁴ *Id.* at 11 (emphasis added).

⁵ See Discovery Conference Order Memorializing October 7, 2021 Agreements and Understandings, *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 (served Oct. 8, 2021) ("The parties reported that there were no outstanding discovery issues . . .").

cautioned that further extensions of the procedural schedule were unlikely to be granted.⁶

Discovery has remained closed since October 2021 and the Board has taken no action to reopen it. The Board’s May 17 Decision did not “necessitate[]” supplemental interrogatories to CSXT and NSR as Amtrak alleges.⁷ The Board’s order simply offers Amtrak an opportunity to remedy the significant gaps in its case using information already in Amtrak’s possession. Nothing in the Board’s May 12 comments on the record or the May 17 Decision suggested that the Board intended to reopen discovery. Indeed, the Board explicitly acknowledged that Amtrak already has all the data it needs to run its own RTC model and supplement its evidence based on the model’s outputs.⁸ Furthermore, the Board’s May 17 Decision provided only a short, 32-day timeframe for the submission of supplemental evidence. Clearly the Board did not contemplate a lengthy, renewed discovery period at this juncture.

Amtrak’s citation to a Board order in its § 24308(a) dispute with Canadian National Railway Company (“CN”) to justify reopening discovery at this late stage

⁶ Decision, *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 (served Oct. 14, 2021) at 1 (explaining that any further requests for procedural schedule extensions “will be scrutinized closely” and the parties “should not assume that further extensions will be routinely granted”).

⁷ Motion to Compel at 1.

⁸ See May 12, 2022, Rough Hr’g Tr. at 03:14:50 (“[Amtrak’s experts] can provide us with some additional evidence . . . by using the RTC software *as produced*. And I think [Amtrak’s expert] said he could load that on the computer and he can put in his own modifications and come up with some results”) (quoting Chairman Oberman) (emphasis added).

of the proceeding is unavailing.⁹ The “additional discovery after an initial discovery period” granted by the Board in that case came a mere month after opening submissions were due but *before* rebuttal submissions had been filed.¹⁰ The additional discovery requests also came months before opening and reply briefs. Indeed, the Board characterized its order as an “extension” of a discovery period that had just concluded.¹¹ In contrast, Amtrak’s Motion to Compel here would reopen discovery nearly *eight months* after the discovery phase of this case closed; six months after opening evidence, reply evidence, and rebuttal evidence were filed by all parties; and following 11 days of exhaustive fact and expert witness testimony by the parties and questioning by the Board in a hearing on the record.

The Board further justified the discovery extension in the CN case because “the parties anticipated additional discovery after opening submissions, and Amtrak has explained its need for additional discovery and why it did not seek discovery earlier.”¹² Here, CSXT and NSR did not—and had no reason to—anticipate additional discovery at this late stage of the proceeding, especially since Amtrak lodged no concerns about the adequacy of discovery between October 2021

⁹ See Motion to Compel at 2 (quoting *Application of the Natl. R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Canadian Nat’l. Ry. Co.*, STB Docket No. FD 35743, slip op. at 2 (served Oct. 7, 2015)) (“Indeed ‘[u]nder 49 C.F.R. § 1114.21, parties may seek discovery without prior Board approval and the rule does not prohibit parties from seeking additional discovery after an initial discovery period.’”)

¹⁰ *Canadian Nat’l Ry.*, FD 35743, slip op. at 2.

¹¹ See *id.*

¹² *Id.*

and its instant motion. And in the CN case, Amtrak's request for additional discovery resulted in a roughly 60-day extension to allow the parties time to serve and respond to discovery requests. In contrast, Amtrak's instant Motion to Compel demands CSXT and NSR respond to these supplemental interrogatories within the 32-day supplemental evidence period with no procedural schedule extension all while CSXT and NSR simultaneously try to prepare their own submission. Indeed, Amtrak has opposed even CSXT and NSR's request for a two-week extension of the June 13, 2022 filing deadline to accommodate the unavailability of their experts.

Amtrak also falters in its attempt to explain its need for additional discovery.¹³ Amtrak asks the Board to take it at its word that Amtrak's present discovery requests respond to the Board's May 17 Decision, but Amtrak's Motion to Compel fails to tie any of the expansive requests to the Board's specific directives.¹⁴ Even if the requests were narrowly tailored and appropriate (they are not), Amtrak has provided zero justification for why it did not seek this discovery earlier. The gaps the Board identified in Amtrak's evidence on May 12 have been known to Amtrak from the beginning. Leaving those gaps open was, in fact, a deliberate litigation strategy choice that Amtrak is now realizing has backfired.¹⁵

¹³ *Id.* (observing that Amtrak had "explained its need for additional discovery and why it did not seek discovery earlier").

¹⁴ See Motion to Compel at 2–3.

¹⁵ See May 12, 2022, Rough Hr'g Tr. at 03:31:25–32:58 (Chairman Oberman commented: "As I see it, what the Amtrak strategy has been is a very risky one, basically relying on an argument that [CSXT and NSR] have failed in their burden of proof. . . . [W]hether they have met their burden of proof could very much be influenced by what [Amtrak] put into evidence. . . . [E]vidence [from an RTC model

Notwithstanding its protestations to the contrary, Amtrak possesses sufficient information to fill whatever gaps in its case it wishes.

Amtrak's present, wide-ranging discovery requests would require a lengthy extension to the procedural schedule to accommodate the massive effort CSXT and NSR would have to undertake to respond with the level of detail Amtrak requests. If Amtrak were allowed additional discovery, CSXT and NSR would insist on the opportunity to respond and take additional discovery in kind, taking this case back to square one. CSXT and NSR submit that Amtrak has not justified its extraordinary request to reopen discovery in this case.

II. EVEN IF DISCOVERY WERE REOPENED, AMTRAK'S PRESENT DISCOVERY REQUESTS ARE OVERBROAD AND NOT PERMITTED BY THE BOARD'S RULES.

Even if the Board were to reopen discovery, Amtrak's requests are overbroad and thus fail to comply with the Board's discovery rules. The Board's rules allow parties to obtain discovery regarding "any matter, not privileged, relevant to the subject matter involved" that is "reasonably calculated to lead to the discovery of admissible evidence" in the proceeding.¹⁶ Many of Amtrak's interrogatories and requests for production are simply not "reasonably calculated" to address the questions the Board has asked of Amtrak in the wake of the hearing on the record.

showing operational changes] wasn't supplied to us. And I think it was Amtrak's job to do it. And I don't want to see Amtrak take that litigation strategy in the future. You can if you want, but I don't think it's constructive.").

¹⁶ 49 C.F.R. § 1114.21(a)(1).

One example of the overbreadth of Amtrak’s requests is Interrogatory No. 8, which demands detailed costs for a list of track and structures components “[f]or any capital project completed by CSX on any division or subdivision in the past five years.”¹⁷ Amtrak does not attempt to tie this request for CSXT’s internal costs for track, turnouts, miter rails, or bridges to any topic of interest to the Board. Rather, the Board’s requests address “average speed,” “velocity,” “operational changes,” project phasing, “customer-centric freight service” metrics, “benefit and impact of . . . individual infrastructure projects,” and operational effects of bridge automation and scheduling.¹⁸ None of these Board requests has to do with materials costs, and none has to do with CSXT or NSR’s network beyond the Gulf Coast.

The Board observed that Amtrak had “supplied [it] with almost no facts on which to judge” whether \$100 million for the Gulf Coast Working Group (“GCWG”) recommendations was “the right amount.”¹⁹ To the extent this inquiry reaches to cost estimates, Amtrak can look to cost breakouts in the 2017 report itself or engage its own engineering cost experts to review the GCWG recommended projects without reaching to CSXT or NSR’s data.²⁰ CSXT and NSR’s expert consultants provided a detailed cost estimate for materials associated with their proposed 14

¹⁷ Motion to Compel, Ex. A at 6–7; *see id.*, Ex. B at 6 (Interrogatory No. 7 to NSR).

¹⁸ *See, e.g.*, May 12, 2022, Rough Hr’g Tr. at 02:49:37, 03:00:33, 02:55:40, 02:59:25, 03:00:51, 03:30:31, and 03:31:01.

¹⁹ May 12, 2022, Rough Hr’g Tr. at 02:59:13.

²⁰ GULF COAST WORKING GROUP REPORT TO CONGRESS, The Gulf Coast Working Group (July 2017), at 30 & App’x L.

infrastructure projects that Amtrak failed to challenge; Amtrak is fully capable of conducting a similar analysis.²¹ And even if Amtrak had CSXT and NSR's historical cost data, the applicability of those historical costs to costs on the system today, in an inflationary environment and tight labor market, is speculative. Finally, if this data were so essential to Amtrak's case, Amtrak has given no reason why it could not have requested this data months ago, during the prescribed discovery period, or even during the evidentiary submission phase last fall. Indeed, Amtrak should have been prepared to defend the reasonableness and sufficiency of the FRA projects outlined in the GCWG's report given that Amtrak has long held the position that the FRA projects should be implemented, albeit not before Gulf Coast passenger service commences.²²

Another example of an excessively overbroad Amtrak request is Interrogatory No. 3, which requests 21 metrics "[f]or each CSX subdivision over which Amtrak service operated . . . for the period of September through November 2019."²³ Metrics like "[n]umber of sidings of insufficient length to accommodate train lengths anticipated to run on the subdivision in 2039" would require CSXT to undertake bespoke forecasting that would be time-consuming, expensive, and ultimately not probative of any issue posed by the Board.²⁴ To the extent the Board sought a

²¹ See Engineering Cost Assessments Report, New Orleans – Mobile Gulf Coast, Proposed Infrastructure Projects, V3 Companies (filed Nov. 3, 2022), at Exhibit B-2.

²² See, e.g., May 9, 2022, Hr'g Tr. at 3095:20–3096:8 (examination of Jim Blair).

²³ Motion to Compel, Ex. A at 4–5; see *id.*, Ex. B at 4–5 (Interrogatory No. 3 to NSR).

²⁴ *Id.*, Ex. A at 5; see *id.*, Ex. B at 5.

comparison of the Gulf Coast line to “other lines that are similar to” it, the inquiry was restricted to train velocities only, not inclusive of Amtrak’s long laundry list of requests.²⁵ As CSXT and NSR evaluate ways to provide the Board with information it will find useful in the time allotted by the May 17 Decision, metrics like these requested by Amtrak require careful and time-intensive analysis and study, which puts them outside the reach of a permissible discovery request.²⁶ It is a bedrock feature of Board practice that parties are not required to perform a special study, as now demanded by Amtrak.

Even if the discovery period were open—and it is not—the Board regularly denies discovery requests when the party seeking discovery “has not demonstrated that a response to [an] interrogatory is reasonably likely to lead to information that is relevant to the issues in [the] proceeding.”²⁷ And an “interrogatory [that is] is overly broad and appears overly burdensome on its face” does not meet that standard, and a “motion to compel as to [it]” will be denied.²⁸ That is the case here. Amtrak has not demonstrated how CSXT’s or NSR’s responses could be reasonably

²⁵ See May 12, 2022, Rough Hr’g Tr. at 03:05:14.

²⁶ See *Finch Paper LLC—Petition for Declaratory Order*, STB Docket No. FD 35981 (served Jan. 18, 2017), slip op. at 3. (“Discovery obligations generally require responsive information to be provided only to the extent and in the form it is customarily maintained by the responding party. They do not require the responding party to conduct any ‘special study’ to compile information not customarily maintained by the responding party or to provide information customarily maintained by the responding party in a different form than the responding party customarily maintains it.”).

²⁷ See, e.g., *Canadian Nat’l. Ry.*, FD 35743, slip op. at 10 (served Sept. 23, 2014).

²⁸ *Id.*

likely to respond to the Board's May 17 Decision and May 12 comments on the record inquiring into specific issues on the Gulf Coast corridor. Instead, Amtrak simply asserts without explanation that its interrogatories are designed to respond to topics of interest to the Board.²⁹ Moreover, Amtrak's requests are massively broad and unduly burdensome on their face, in that Amtrak would require CSXT and NSR to compile numerous metrics from across their North American systems on a tight timeline to comply. Indeed, CSXT and NSR submit that it is impossible to gather, synthesize, validate, and produce the special information requested by Amtrak in the supplemental-comment period. And Amtrak's Motion to Compel fails to heed the Board's guidance that such motions "should reflect at the outset any limitations that the party seeking discovery is willing to accept to reduce the burden of discovery."³⁰

Putting aside the fact that discovery closed months ago by Board order, and that this motion was not filed with the administrative law judge as also required by Board order, the Board should deny Amtrak's untimely Motion to Compel CSXT and NSR to produce overbroad, burdensome discovery that demands special studies by CSXT and NSR, is unlikely to provide information relevant to the Board's inquiries, and would take months to search for, craft, and produce the demanded metrics to Amtrak.

²⁹ See Motion to Compel at 3–4 (After restating three topics of interest to the Board, Amtrak declares that "those are the three categories sought in the attached interrogatories[.]").

³⁰ *Canadian Nat'l. Ry.*, FD 35743, slip op. at 11.

CONCLUSION

For the reasons set forth above, the Board should deny Amtrak's Motion to Compel.

Respectfully submitted,

/s/ William A. Mullins

William A. Mullins
Crystal M. Zorbaugh
BAKER AND MILLER PLLC
2401 Pennsylvania Avenue
Suite 300
Washington, DC 20037
(202) 663-7823
wmullins@bakerandmiller.com
czorbaugh@bakerandmiller.com

*Counsel for Norfolk Southern Railway
Company*

/s/ Raymond A. Atkins

Raymond A. Atkins
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
ratkins@sidley.com
mjwarren@sidley.com

Counsel for CSX Transportation, Inc.

Dated: May 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2022, a copy of the foregoing Opposition to Amtrak's Motion to Compel was served by email or first-class mail on the service list for Finance Docket No. 36496.

/s/ Raymond A. Atkins

Raymond A. Atkins
SIDLEY AUSTIN LLP