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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

**BRIEF OF THE ALABAMA STATE PORT AUTHORITY
AND TERMINAL RAILWAY ALABAMA STATE DOCKS
ADDRESSING THE BOARD'S MARCH 14TH DECISION**

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ALABAMA STATE DOCKS**

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The Alabama State Port Authority (“ASPA”) and its rail common carrier operating division, Terminal Railway Alabama State Docks (“TASD”)—collectively, the “Port”—hereby submit this brief in response to the Board’s decision served March 14, 2022 (the “March 14th Decision”), which directed the parties to this proceeding (the “Parties”) to address five specific, enumerated issues (the “Issues”) in connection with the upcoming evidentiary hearing scheduled to begin on April 4, 2022. The Board has contemplated that the Parties would discuss the enumerated Issues during the hearing, and, speaking only for itself, the Port will be prepared to do so. However, the Parties have all agreed that it could be more useful and efficient for each Party to share its views on the Issues thoroughly and in writing, by way of briefs, which the Parties agreed should be tendered to the Board by April 1, 2022. Accordingly, the Port hereby tenders its brief.

The first two Issues raised in the March 14th Decision pertain to certain operating agreements currently in place between the National Railroad Passenger Corporation (“Amtrak”), CSX Transportation, Inc. (“CSXT”), and Norfolk Southern Railway Company (“NSR”). These two Issues do not relate to the Port’s participation or interests in this proceeding, and the Port will not address them.

The remaining three Issues (Issues 3 through 5, specifically) apply to the Port, and, therefore, the Port submits this brief to address them. The Port addresses those related Issues in the order they were presented in the Board's decision as follows:

- Whether, in a proceeding under 49 U.S.C. § 24308(e) where it finds that CSXT, NSR and the Port have not demonstrated that Amtrak's operation of additional trains would "impair unreasonably freight transportation" and orders operation of the additional trains, the Board may require the construction of additional infrastructure pursuant to its separate authority to "prescribe reasonable terms and compensation for using the facilities and services" under 49 U.S.C. § 24308(a).
- Whether, in a proceeding under 49 U.S.C. § 24308(e) where it finds CSXT, NSR and the Port have demonstrated Amtrak's operation of additional trains would "impair unreasonably freight transportation" without some additional infrastructure, the Board could nonetheless order CSXT and NSR to allow for the operation of those additional trains in this proceeding subject to the construction of additional infrastructure under 49 U.S.C. § 24308(a) or some other authority.
- Whether, in a proceeding under 49 U.S.C. § 24308(e), the Board may determine which party bears the cost of constructing additional infrastructure or otherwise apportion the costs of that additional infrastructure under 49 U.S.C. § 24308(a). The Port also addresses generally the Board's authority with respect to applications filed under 49 U.S.C. §§ 24308(a) and 24308(e).

As an initial matter, the Port stresses that Amtrak filed its application under 49 U.S.C. § 24308(e), not 49 U.S.C. § 24308(a), and the Board must take Amtrak's application as it has been filed. Sections 24308(a) and 24308(e) are separate and distinct statutory provisions, with distinct functions. The Board does not have authority in a Section 24308(e) proceeding to require the construction of additional infrastructure—either as a mitigation to a finding that Amtrak's proposed additional trains would unreasonably impair freight transportation or as an adjunct to a finding that the additional trains would *not* have such an effect—and the cross-reference in Section 24308(e)(3) to handling compensation disputes under Section 24308(a) does not import such authority into Section 24308(e). Relatedly, the Board does not have authority in

this proceeding to order CSXT and NSR to allow for the operation of additional trains under Section 24308(a), because an application filed under Section 24308(e) does not properly invoke relief under Section 24308(a) – the Board must adhere to Amtrak’s choice of statute, or it could have at any time recommended that Amtrak initiate proceedings under Section 24308(a) if the Board were inclined to explore infrastructure mitigation as a precondition to Amtrak service. Section 24308(a) does not permit the Board to, in essence, file its own application. It follows that, because this is not a Section 24308(a) proceeding, the Board may not allocate infrastructure costs. These points dovetail into the Port’s final point, which is that the Board’s authority under Sections 24308(a) differs from its authority under Section 24308(e), and since Amtrak’s application was filed under Section 24308(e), matters only properly considered in a proceeding under Section 24308(a) must have no bearing upon that application. For these reasons, the Port thinks that, under the applicable statutory criteria, Amtrak’s application must be denied.

INFRASTRUCTURE AND SECTION 24308(e)

Amtrak initiated this proceeding by filing an application under Section 24308(e), a provision originally adopted in 1980 as an amendment to the Rail Passenger Service Act of 1970 (“RPSA”).¹ Section 24308(e) contains three distinct subsections. The statute provides the following in its first subsection:

When a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over the rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times. However, if the Board decides not to hold a hearing, the Board, not later than 30 days after receiving the

¹ Passenger Railroad Rebuilding Act, Pub. L. No. 96-254, § 216, 94 Stat. 410 (1980), *originally codified at* 45 U.S.C. § 562(h) (1982) (adopting a predecessor of Section 24308(e) as Section 402(h) of RPSA).

application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.

49 U.S.C. § 24308(e)(1) (as amended). The second subsection adds:

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; and (B) when establishing scheduled running times, 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.

Id. at § 24308(e)(2). Finally, the statute provides in its third subsection:

Unless the parties have an agreement that establishes the compensation Amtrak will pay the carrier for additional trains provided under an order under this subsection, the Board shall decide the dispute under subsection (a) of this section [*i.e.*, under 49 U.S.C. § 24308(a)].

Id. at § 24308(e)(3).

This is in contrast to 49 U.S.C. § 24308(a), which has been a part of RPSA since Amtrak's creation.² That statute provides the following in the first subsection of its four subsections:

Amtrak may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree. The terms shall include a penalty for untimely performance.

49 U.S.C. § 24308(a)(1). The second subsection of this statute provides:

(A) If the parties cannot agree and if the Surface Transportation Board finds it necessary to carry out this part, the Board shall—(i) order that the facilities be made available and the services provided to Amtrak, and (ii) prescribe reasonable terms and compensation for using the facilities and providing the services.

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when

² See Rail Passenger Service Act, Pub. L. No. 91-518, § 401(a), 84 Stat. 1327, 1335 (1970), originally codified at 45 U.S.C. § 562(a).

determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

- (C) The Board shall decide the dispute not later than 90 days after Amtrak submits the dispute from the Board.

Id. at § 24308(a)(2). The third subsection of the statute provides:

Amtrak’s right to use the facilities or have the services provided is conditioned on payment of the compensation. If the compensation is not paid promptly, the rail carrier or authority entitled to it may bring an action against Amtrak to recover the amount owed.

Id. at § 24308(a)(3). Finally, the statute provides:

Amtrak shall seek immediate and appropriate legal remedies to enforce its contract rights when track maintenance on a route over which Amtrak operates falls below the contractual standard.

Id. at § 24308(a)(4).

The Port has recited the complete text of the two sections of the RPSA to reinforce exactly what authority and responsibility the Board has received from Congress in settling disputes between Amtrak and freight rail carriers—in this case, CSXT, NSR, and the Port. This is especially relevant in light of the inquiries the Board directed to the parties in its March 14th Decision, which suggest that in an action brought under Section 24308(e), this Board might be inclined to order remedies pursuant to its prescriptive authority under Section 24308(a). *See, e.g.*, March 14th Decision at 2 (“If the Board...ordered CSXT and NSR to provide or allow for the operation of additional trains, may the Board, in accordance with § 24308(e)(3), also require the construction of additional infrastructure...pursuant to § 24308(a)?”).

Statutory construction begins with the language of the statute. *E.g.*, *Grand Trunk W. R. Co. v. U.S. Dep’t of Labor*, 875 F.3d 821, 824 (6th Cir. 2017). If the language of the statute is plain and easily understood, the statute should be construed and implemented

“according to its terms.” *Id.* at 824-25 (internal citations and quotation marks omitted). Beyond that, the structure and history of legislative enactments can also be utilized to inform their proper interpretation. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (listing principles of statutory construction including language, design, policy, and history of statute).

Addressing the Board’s question of whether it may, in response to a petition requesting an order for additional train service under Section 24308(e), order the construction of mitigating infrastructure pursuant to Section 24308(a) or otherwise, *see* March 14th Decision at 2, the language, structure and history of Section 24308(e) all compel a negative answer.

Nothing in the language of Section 24308(e) addresses infrastructure at all. The statute authorizes Amtrak, in the event a rail carrier refuses to permit Amtrak to operate additional trains over its lines, to apply for an order from the Board compelling that carrier to permit Amtrak to operate them. 49 U.S.C. § 24308(e)(1). After holding a hearing (a matter of Board discretion), the Board may direct the rail carrier to permit the operation of the additional Amtrak trains within sixty days of a Board order. *Id.*³ In any hearing on an application, the Board must consider two types of evidence: whether its order would “impair unreasonably” freight transportation on the lines of the rail carrier, and, when setting running times, Amtrak’s

³ The actual language of the statute – “After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains . . .” – can be read as slightly ambiguous: Does a Board order need to come within 60 days of the hearing? Or does a Board order have to require the rail carrier to allow the additional Amtrak trains within 60 days of the order? The Port believes the latter interpretation is the correct one. This would seem to be confirmed by the former regulations of the Federal Railroad Administration (“FRA”), the modal administration which, as discussed below, previously was entrusted with implementing Section 24303(e). Those extremely detailed procedural regulations provided for post-hearing briefs; a recommended decision by the hearing examiner; a round of comments on the recommended decision; finally a decision by the FRA administrator, all with no reference to any 60-day deadline for final action after conclusion of the hearing. 49 C.F.R. §§ 201.21(b), 201.22 and 201.23 (2008) (repealed).

legal requirement to maintain an average train speed of sixty miles per hour across its system “with a high degree of reliability and passenger comfort.” *Id.* at § 24308(e)(2). Finally, the statute provides that, absent an agreement between Amtrak and the rail carrier determining the *compensation* which Amtrak must pay to that carrier for the extra trains operated pursuant to the order, the Board would decide that particular dispute—*i.e.*, the dispute over *compensation*—under Section 24308(a). *Id.* at § 24308(e)(3).

There is no provision in Section 24308(e) which even mentions infrastructure, let alone a provision authorizing or requiring the Board to order that infrastructure be built in response an application brought under Section 24308(e). The statute simply allows Amtrak to file an application and authorizes the Board to issue an order requiring that extra trains be operated over the lines of a rail carrier. *Id.* at § 24308(e)(1). The plain language of the statute contemplates the Board giving a “yes or no” answer to Amtrak’s application for an order compelling additional train service, and requires such service (if approved) to commence within two months. Since the language of the statute is plain, it must be enforced according to its terms. *Grand Trunk W. R. Co.*, 875 F.3d at 824-25. The Board may not, pursuant to Section 24308(e), require the construction of additional infrastructure in response to Amtrak’s application for additional train service.

This stands in distinct contrast to Section 24308(a). That statute provides that, if a freight railroad and Amtrak cannot reach agreement for Amtrak’s use of the freight railroad’s track and facilities, Amtrak may apply to the Board for access to such facilities, and the Board may set the terms and compensation to govern such access. 49 U.S.C. § 24308(a)(1)-(2). Precedent is clear that those terms may include the construction of infrastructure to mitigate the impacts of Amtrak’s trains on rail freight service. *See, e.g., National R.R. Passenger Corp.* –

Applic. – 49 U.S.C. 24308(a), 3 S.T.B. 157, 170-171 (1998) (“*Amtrak/Guilford*”) (setting terms and conditions under Section 24308(a) for initiation of new Amtrak service, including length of new bypass track around yard required to avoid interference with freight operations).

The *Amtrak/Guilford* decision led to additional proceedings that further demonstrates the Board’s ability to determine under Section 24308(a) the extent of infrastructure improvements to a rail line needed to accommodate implementation of Amtrak passenger service. *National R.R. Passenger Corp. – Petition – Weight of Rail*, 4 S.T.B. 416 (1999) (“*Weight of Rail I*”); 5 S.T.B. 870 (2001) (“*Weight of Rail II*”); *National Railroad Passenger Corporation – Petition Declaratory Order – Weight of Rail*, FD 33697 (STB served Jan. 31, 2003) (“*Weight of Rail III*”). Those cases addressed points of contention between Amtrak and Guilford Transportation Industries, Inc. (“Guilford”) over the weight of rail necessary to allow Amtrak’s trains to adhere to a proposed schedule on a new passenger route over Guilford between Boston, Massachusetts and Portland, Maine. Amtrak averred that 115-pound rail would be sufficient for its purposes, while Guilford insisted on the installation of 132-pound rail. *Weight of Rail I*, 4 S.T.B. at 418. After hearing considerable evidence, the Board concluded in a Section 24308(a) proceeding that 115-pound rail would suffice, and entered an order accordingly. 4 S.T.B. at 425-426.

After the Board decided *Weight of Rail I*, Amtrak and Guilford reached a further impasse, this time over the sufficiency of the track safety inspection techniques to be utilized in testing the newly-installed 115-pound rail. Amtrak asserted that it needed access to Guilford’s lines one time, with a track loading vehicle, to complete the track safety inspection properly. *Weight of Rail II*, 5 S.T.B. at 871. Guilford disputed the reliability of the track loading vehicle as a method of testing and insisted that repeat tests would be necessary. 5 S.T.B. at 873-874.

Accordingly, Amtrak initiated a new proceeding under Section 24308(a). Finding Guilford's contentions lacked any evidence to support them, the Board determined Amtrak's proposed track safety testing was adequate, and ordered Guilford to grant Amtrak access to conduct that testing. 5 S.T.B. at 875-876.

Amtrak and Guilford then disputed whether Amtrak could safely operate its trains at a track speed of 79 miles per hour. *Weight of Rail III*, at 2. Amtrak then initiated a third proceeding under Section 24308(a), seeking the Board's determination that it could safely operate trains at seventy-nine miles per hour, and asking the Board to set the terms of its access to Guilford's rail line accordingly. *Id.* at 3. Noting that "[w]e [*i.e.*, the Board] have statutory authority to prescribe terms of access," *id.*, Guilford was ordered to permit Amtrak's trains to operate at seventy-nine miles per hour over its lines. *Id.* at 5.

This history illustrates that the Board has authority to order a freight carrier to allow Amtrak access to its facilities, to set the terms and compensation under which that access is to be provided, and if necessary, to order improvements to infrastructure as a part of those terms, *under Section 24308(a)*. 49 U.S.C. § 24308(a)(1)-(2); *Weight of Rail III*, at 3.

Section 24308(e) is very different. It governs Amtrak's request to add extra train service on the lines of a rail carrier, and requires the Board to give a "yes or no" decision that (if affirmative) would require the additional Amtrak trains to be operating within sixty days. Indeed, it is not clear how this "sixty day" requirement could be met if the Board had the authority and ability to order infrastructure improvements in connection with a Section 24308(e) order – since it is extremely unlikely that infrastructure projects of any meaningful scope ordered by the Board could be planned, coordinated and implemented within two months so as to allow the additional Amtrak trains to be operating within the time frame contemplated by the statute.

Sections 24308(a) and 24308(e) are thus distinct sections of the RPSA, enacted at different times, with distinct clauses and distinct language. The Board must presume that Congress acted intentionally when it enacted these two separate provisions. *Grand Trunk R. Co.*, 875 F.3d at 825 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Since these sections are distinct, it follows that the Board may not, in an Amtrak-initiated action under Section 24308(e), enter an order compelling the construction of infrastructure under Section 24308(a).

The history of the development of Section 24308(e) also makes clear that the Board may not order infrastructure to be constructed in a proceeding under that section. To see this, it is important to understand that today's Section 24308(e) was not a part of the RPSA as it was originally enacted in 1970. *See* Rail Passenger Service Act, Pub. L. No. 91-518, §§ 101 *et seq.*, 84 Stat. 1327 (1970) (omitting what is now Section 24308(e) from original law). The immediate predecessor of Section 24308(e) was enacted in 1980, in a clause included within the Passenger Railroad Rebuilding Act ("PRRA"), Pub. L. No. 96-254, § 216, 94 Stat. 410, 418 (1980), *originally codified at* 45 U.S.C. § 562(h) (1982). During the late 1980s and 1990s, Congress amended and re-codified the PRRA, resulting in the clause in its current form, codified as Section 24308(e).⁴

Critically, as initially enacted in 1980, what is now Section 24308(e) was not administrated by the Board or its predecessor, the Interstate Commerce Commission ("ICC"). Instead, Section 24308(e) fell within the purview of the Secretary of Transportation and (via

⁴ *See* Consolidated Omnibus Budget Reconciliation Act, Pub. L. No. 99-272, § 4006, 100 Stat. 107 (1986) (amendment of the statute); *see also* An Act to Revise, Codify, and Enact without Substantive Change Certain General and Permanent Laws, Related to Transportation, as Subtitles II, III, and V-X of Title 49, United States Code, "Transportation," and to Make Other Technical Improvements in the Code, Pub. L. No. 103-272, § 24308(e), 108 Stat. 745 (1994) (tracing amendments to what by then was 45 U.S.C. § 562(g) and its recodification to Section 24308(e)).

delegation) the FRA. *See* Pub. L. No. 96-254, § 216, 94 Stat. 410; *see also* Pub. L. No. 103-272, § 24308(e), 108 Stat. 745. Thus, for most of the statute’s existence, the STB and the ICC were not entrusted to settle disputes under Section 24308(e). It was not until 2008 that Congress transferred authority over these proceedings to the Board, with the passage of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. No. 110-432, § 213, 122 Stat. 4907 (2008). On the other hand, the STB and the ICC have always been the implementing agencies for what is now Section 34308(a).

Given that authority under the two statutes as originally enacted was not even lodged in the same agency, it is difficult to conceive how Congress could have intended that a proceeding under Section 24308(e) would generate “cross-over” authority to simultaneously order infrastructure improvements pursuant to Section 24308(a). When the Board historically had no jurisdiction under Section 24308(e) at all, it would not be legally or logically persuasive for the Board to find that it can require the construction of infrastructure under Section 24308(a) in a proceeding under Section 24308(e).

This history also provides important explanatory context for Section 24308(e)(3), which provides that if the Board orders the operation of additional trains pursuant to Section 24308(e), any dispute between Amtrak and the freight carrier as to compensation should be decided in a proceeding under Section 24308(a). Given that the FRA was historically responsible for additional train access requests under Section 24308(e), and the STB/ICC was separately responsible for setting terms and compensation under Section 24308(a), this inter-agency cross-reference makes complete sense. Indeed, it reinforces the distinct nature and function of the two statutory provisions. Nothing in the 2008 reassignment of Section 24308(e) responsibilities to the Board indicates any Congressional intent to obliterate those distinctions.

The Board, in the past, has well understood the distinct nature and roles of Sections 24308(a) and 24308(e). In addressing its jurisdiction under Section 24308(a) in *Amtrak/Guilford*, the Board explained that:

The Secretary's authority [under Section 24308(e)] pertains to those instances where Amtrak is already operating on the line and wishes to modify its service by either operating at higher speeds or by operating additional trains. Here, we are dealing with a situation where Amtrak wants to establish first-time service and seeks a determination of the terms of such access to the facilities.

3 S.T.B. at 170. The Board construed Section 24308(e) as indicating that “the Secretary can only order increased . . . number of trains on lines where Amtrak is already operating,” and contrasted that with the Board’s authority under Section 24308(a) to require rail line rehabilitation in setting the terms and conditions for commencement of passenger service on a rail line that did not currently host Amtrak trains. 3 S.T.B. at 170-171. As the Board recognized, the authorities and powers under Sections 24308(a) and 24308(e) are not interdependent or co-extensive, and the invocation of one remedy does not implicate or trigger the other.

Consistent with all of this, Amtrak, in its application to the Board, has made no proposals for *any* infrastructure mitigation—not a single dollar’s worth. *See* Amtrak Application, filed March 16, 2021. Amtrak’s application is – appropriately – simply a request for a “yes or no” decision from the Board on whether to order CSXT and NSR to provide Amtrak access to their lines for its trains. From this, it is clear that Amtrak recognizes that no discussion of infrastructure mitigation is either authorized or required in response to its application. Under Section 24308(e), and as Amtrak has filed its application, the Board must consider unreasonable impairment of freight transportation and Amtrak’s ability to maintain its statutory average speeds, reliability, and passenger comfort. 49 U.S.C. § 24308(e)(2). It follows that the Board’s responsibility under Section 24308(e) is to decide whether the carriers have

shown that Amtrak's operations as proposed would cause unreasonable impairment, and if not, then to order that Amtrak be allowed to run its additional trains within 60 days of a Board decision. Otherwise, Amtrak's application must be denied.

Nor can there logically or legally be a scenario in which the Board determines under Section 24308(e) that Amtrak's proposed passenger operations do *not* unreasonably impair freight transportation, but then prescribes in the same proceeding the construction of additional infrastructure. *See* March 14th Decision at 2 (Issue #3). If the Board finds there is a need to consider infrastructure improvements in connection with a Section 24308(e) application and that such improvements may be appropriate – even though the Board does not have authority to order infrastructure improvements under Section 24308(e) – then, by definition, a no-infrastructure proposal cannot pass the impairment test and the application must be denied. In those circumstances, Amtrak's remedy would be to seek appropriate terms and conditions, including a requirement for infrastructure improvements, pursuant to Section 24308(a).

In brief, the Board may not, under 49 U.S.C. § 24308(e), require the construction of additional infrastructure under its authority to “prescribe reasonable terms and compensation for using the facilities and services” under 49 U.S.C. § 24308(a). It is clear from the plain language of the statute, the legal presumption of Congress's intent in enacting them separately, and the history of Section 24308(e), that they are distinct statutes, providing for distinct types of proceedings and distinct remedies, in response to distinct types of applications, under distinct processes (ninety days for a decision under Section 24308(a) and sixty days for implementation

of additional train operations after a decision under Section 24308(e)). The Board does not have authority to act under Section 24308(a) in a proceeding initiated under Section 24308(e).⁵

COSTS OF ADDITIONAL INFRASTRUCTURE UNDER SECTION 24308(a)

The Port maintains that the Board *in this proceeding* does not have authority “under § 24308(a), to determine which party bears the cost of constructing which infrastructure projects or otherwise apportion the costs of additional infrastructure[.]” March 14th Decision at 2. The Board’s presentation of this Issue in its March 14th Decision presumes that there is a Section 24308(a) case pending in which such an apportionment could take place. As discussed at length above, however, this is *not* a Section 24308(a) case, and the Board does not have authority to convert Amtrak’s pending application into such a proceeding. And because the Board may not order infrastructure improvements in the context of a Section 24308(e) case such as this one, the Board’s framing of this issue posits a hypothetical without a legal basis.

If a Section 24308(a) case were to be commenced with respect to Amtrak’s desire to operate passenger trains between New Orleans and Mobile, the Port would explain in greater detail there why the cost of infrastructure improvements necessary to accommodate such service could not properly be allocated to the affected freight railroads. The Port briefly notes here that the statute requires Amtrak to pay the incremental costs of Amtrak’s use of rail carrier facilities and services, 49 U.S.C. § 24308(a)(1)(B), and infrastructure improvements associated with Amtrak passenger service that a freight carrier would not otherwise undertake are plainly a “but

⁵ The Board seems to have recognized the essential difference between proceedings brought under these two separate statutes, and the anomaly presented by the current proceedings, when it acknowledged an argument made by CSXT and NSR that their dispute with Amtrak might be resolved under Section 24308(a), even though it did not dismiss the action accordingly, and decided to initiate a proceeding under Section 24308(e). *See* Decision served Aug. 6, 2021, at 6 n.10, 12.

for” incremental cost, regardless of any incidental benefit that the freight carrier might receive from the improvements. This was evident in the *Weight of Rail* decisions discussed above; the Board addressed the rehabilitation of the subject rail line and whether there should be 115-pound rail or 132-pound rail laid along Guilford’s line, but there was never any question of Guilford paying for the rail in either case. Indeed, nearly \$40 million in public funding was to be used to pay the cost of infrastructure along Guilford’s line. *Amtrak/Guilford*, 3 S.T.B. at 164, 166; *see also* 3 S.T.B. at 171 (referring to the Board’s “sanctioning the rehabilitation of the line with public funds”). There is nothing in Section 24308(a), or any precedents in applications made under Section 24308(a), which allows for the division of needed infrastructure costs between Amtrak and another party.

This makes a great deal of sense, which might be illustrated by a simple “but-for” test. That is, but for Amtrak’s application under Section 24308(a) requesting access to the tracks or facilities of another rail carrier, there would be no need for the Board to set compensation at all. To argue otherwise is nonsense, as that would amount to an argument that the Board must set a formula determining the compensation that a rail carrier, say NSR, must pay to Amtrak in exchange for Amtrak’s access to its own property. Still less is there any precedent requiring a freight carrier to pay for any sort of mitigating infrastructure. From this, the Port must conclude there is ample precedent for the Board to set compensation, but none for the Board to divide the costs of infrastructure between Amtrak and another party. *See* 49 U.S.C. § 24308(a)(1)(B).

GENERAL BOARD AUTHORITY UNDER SECTIONS 24308(a) AND 24308(e)

Finally, the Port offers some general observations about proceedings under the RPSA. First, it is important to stress that only Amtrak is authorized to initiate proceedings under Section 24308(a). This is clear from the language of the statute itself and from ICC and Board

precedent. In an instance where a freight rail carrier applied for relief under Section 24308(a), its application was denied as the result of the ICC's determination that Amtrak, and Amtrak alone, is authorized to initiate proceedings under the statute. *See, e.g., Burlington Nor. R. Co. – Order for Just Compensation*, 7 I.C.C.2d 74 (1990) (decision denying freight railroad's petition for declaratory order on grounds the RPSA permitted Amtrak, and Amtrak alone, to initiate proceedings under the statute).

Based on the statute and such precedent, the Port believes the Board has no authority to initiate proceedings under Section 24308(a) on its own initiative, but may do so upon receipt of an appropriate application from Amtrak. Since Amtrak filed its application under Section 24308(e), it would be inappropriate for the Board to transform Amtrak's application under Section 24308(e) into an application under Section 24308(a). That would amount to the Board initiating a new proceeding under Section 24308(a) – which the Board is not authorized to do – in spite of the fact Amtrak requested action under Section 24308(e) alone, and in spite of the Board's August 2021 determination to initiate a formal proceeding under Section 24308(e) in keeping with Amtrak's request. Decision served Aug. 5, 2021, at 12.

The Port's final concern regarding Amtrak's application relates to the Board's authority under Section 24308(e) and due process under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq.* Under the APA, where no standard of review is provided within a statute, the action of an administrative agency must be examined to see if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *E.g., Alaska Dep't of Env't Conservation v. Env't Prot. Agency*, 540 U.S. 461, 496-97 (2004) (internal citations and quotation marks omitted) (describing legal standard for judicial review of agency action under APA). The nature of the Board's inquiries raises questions of whether the Board

has inappropriately conflated Amtrak's application under Section 24308(e) with an application under Section 24308(a), or is otherwise contemplating converting one sort of proceeding into the other. *See* March 14th Decision at 2.

Amtrak filed its application, and the Board initiated this proceeding, under Section 24308(e). Amtrak Application, filed March 16, 2021, at 1; Decision served Aug. 6, 2021, at 12. As discussed *supra*, Sections 24308(a) and 24308(e) are distinct statutes, enacted for distinct purposes, with distinct requirements and distinct processes. The Port believes the only correct Board response to Amtrak's application under Section 24308(e) is to answer "yes or no," with due consideration of unreasonable impairment of freight rail traffic, and to either grant or deny the application as it has been filed. To convert Amtrak's application under Section 24308(a) into a Section 24308(a) proceeding on the Board's own initiative – particularly at this late juncture in the case – would be an inappropriate "bait and switch" that would raise significant questions about the proceeding in light of the APA.

Respectfully submitted,

By: /s/ *R. A. Wimbish*

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

Dated: April 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of April, 2022, arranged to serve the foregoing
Brief of the Alabama State Port Authority and Terminal Railway Alabama State Docks
Addressing the Board's March 14th Decision 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