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By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
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Re: Finance Docket No. 36496, *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern*

Dear Ms. Brown:

CSX Transportation, Inc. (“CSXT”) respectfully requests leave to submit this brief response to certain new arguments and incorrect facts raised in the National Railroad Passenger Corporation’s (“Amtrak”) response to Norfolk Southern Railway Company (“NSR”) and CSXT’s motion to dismiss Amtrak’s § 24308(e) Application. There is good cause for the Board to accept this brief response, which is limited to clarifying two factual points and responding to two new Amtrak legal arguments.¹

First, Amtrak suggests that its desire to begin STB proceedings without either allowing HDR Engineering, Inc. (“HDR”) to complete its analysis of the impact of Amtrak’s proposed passenger service on freight customers or performing any environmental analysis was driven by CSXT and NSR’s alleged “failures to agree to resumption of the Gulf Coast Service” over many years. *See* Amtrak Resp. at 1, 5–8. That is simply not accurate. Amtrak has never elected to

¹ Amtrak’s suggestion that replies to replies are only permitted “where a party has offered verified statements necessary to supplement the record” is not consistent with the Board’s practice. Amtrak Letter at 1 n.1, Finance Docket No. 36496 (filed May 7, 2021). Here, in a proceeding that has attracted considerable public comment, there is good cause for the Board to allow CSXT to file this brief reply to correct factual misperceptions and address new legal arguments. *See, e.g., Rio Grande Pac. Corp.-Continuance in Control Exemption-Colorado, Midland & Pac. Ry. Co. Colorado, Midland & Pac. Ry. Co.—Lease & Operation Exemption Containing Interchange Commitment—Union Pac. R.R. Co.*, STB Fin. Docket Nos. 36470, 36471, 2021 WL 306285, at *1 n.4 (served Jan. 29, 2021) (accepting reply to reply “in the interest of having a more complete record”); *Soo Line R.R. Co.—Pet. for Declaratory Order and Preliminary Injunction—Interchange with Canadian Nat’l*, FD 36299, slip op. at 1 n.1 (STB served July 19, 2019) (same); *Nat’l Ass’n of Reversionary Prop. Owners—Petition for Rulemaking*, STB Ex Parte No. 749, at 1 n.1 (served Aug. 14, 2018) (same).

restart the pre-Hurricane Katrina Sunset Limited service. Amtrak instead has sought to institute a new, twice-daily service between New Orleans and Mobile, and the first time that it made a formal request to commence that service accompanied by a proposed schedule came on January 27, 2021. *See* Amtrak Resp., Ex. J. Prior to that, CSXT, NSR, and Amtrak have engaged in good faith periodic discussions for years concerning various other iterations of Gulf Coast passenger service. At times, Amtrak chose not to prioritize this corridor over other projects, and the parties certainly have had genuine disagreements about material aspects of those proposed iterations. But real progress was being made, leading to the joint agreement in January 2020 for an RTC study conducted by HDR. CSXT and NSR's request that Amtrak allow that joint study to be completed before service is resumed is part of their continuing good-faith efforts to ensure that any new passenger service would not degrade service to the many stakeholders who depend on reliable freight transportation.

Second, Amtrak suggests that HDR was not given "even the most basic information" it needed to complete a reliable RTC study. Amtrak Resp. at 10. To be clear—HDR was the consultant selected and hired by Amtrak, and HDR was given all the information it needed. Amtrak's complaint is that Amtrak did not get to see the data provided by CSXT and NSR. But that is exactly what the parties agreed to. In January 2020, Amtrak, CSXT, and NSR all agreed to a Data Sharing Agreement, which provided that no party would be required to provide confidential business information (including stringline diagrams) to anyone other than HDR. CSXT-NSR Motion, Ex. D ¶¶ 2–4, 6–7, Ex. E ¶ 5. Thus, CSXT, NSR, and Amtrak could share confidential data with HDR, but would not be required to share it with each other. The point of the RTC Study and Data Sharing Agreements was to designate HDR as the neutral third party expert that would evaluate the limitations and needs of the Gulf Coast corridor and proposed passenger service.

That said, the parties *did agree* that a broad swath of information would be made available to all parties to the RTC Study and Data Sharing Agreements as well as to FRA. The parties committed to sharing non-confidential summaries of all data and inputs as they would be used in each phase of the modeling: Base Case, No Build Case, and any Future Iteration. CSXT-NSR Motion, Ex. D ¶ 7(k), Ex. E ¶¶ 4–5. This included passenger and freight train volumes and schedules, assumptions, parameters, files, and plans. CSXT-NSR Motion, Ex. E ¶ 4. The parties promised to share their respective communications with HDR—including comments on draft reports or HDR-produced materials—with FRA and one another. *Id.* And CSXT and NSR committed to sharing with FRA and Amtrak summaries of all assumptions concerning traffic growth over the 20-year study period of the No-Build Case. *Id.* Amtrak negotiated and willingly agreed to be bound to these terms.

Amtrak claims for the first time in its response that it needed confidential CSXT and NSR information in order to comply with a grant agreement with FRA. *Id.* at 10. But during the contract negotiations that led to the Data Sharing Agreement, Amtrak did not express any concerns that the Data Sharing Agreement was inconsistent with any FRA grant agreement. And Amtrak has never provided to CSXT a copy of this FRA grant agreement.

In sum, Amtrak offers no convincing explanation for why completing an operations modeling study is unreasonable. It is common industry practice to complete an operations modeling study when new or additional passenger service is proposed. Amtrak is on the record endorsing this practice in a 2009 submission to Congress.² Such a study is particularly important here, because of the challenging and unique features of the Gulf Coast corridor, including multiple drawbridges, a largely single-tracked line, and numerous grade crossings. These unique features are why the parties agreed to conduct the RTC study and why so many affected stakeholders have urged the Board to require Amtrak to allow the study's completion.³

Third, Amtrak tries to remedy its own failure to submit an environmental report with its Application by completely reversing the position it took in the Application about the need for infrastructure improvements. In the Application, Amtrak premised its request for an interim order⁴ on the need for ***“access to the rail lines . . . to have enough lead time to make the improvements recommended in the Gulf Coast Working Group’s report.”*** Application at 6 & n.12 (emphasis added). As CSXT and NSR pointed out, a Board order for service that would require such infrastructure construction has environmental impacts that necessitate consideration under the National Environmental Policy Act (“NEPA”) and other federal environmental statutes.⁵ Amtrak thus was obligated by 49 C.F.R. Part 1105 to provide an Environmental Report to begin the Board’s NEPA review.

Amtrak now tries to backtrack, claiming that “Amtrak’s application does not request that the Board order *any* construction projects that would implicate the Board’s obligations to ensure compliance with federal environmental or historic preservation law.” Amtrak Resp. at 16.

² See P.R.I.I.A. Section 226 Gulf Coast Service Plan Report, Amtrak, at 4, 6 (July 16, 2009), publicly available at <https://floridacoalitionofrailpassengers.memberlodge.com/resources/Documents/GulfCoastServicePlanReport.pdf> (explaining that implementation of “daily stand-alone overnight service between New Orleans, Louisiana and Orlando, Florida”—known as “Option 3”—“should be determined through capacity modeling undertaken in collaboration with CSX”).

³ Amtrak also asserts that HDR’s RTC study would have taken at least an additional 28 to 36 weeks to complete beyond the January 23, 2021 deadline. Amtrak Resp. at 9. There is no substantiation for this estimate. CSXT believes that HDR could complete the RTC study in six (6) months or less from the date Amtrak states in writing that the study may resume without violating the parties’ agreements—and potentially much sooner.

⁴ The decisions Amtrak cites in support of its interim order request are inapposite. Amtrak Resp. at 18. These cases arose under Section 402(a) which, unlike Section 402(e), does not impose procedural protections like a hearing on the record and a finding that the passenger service would not unreasonably impair freight transportation. The interim orders in the *Louisiana & Arkansas Railway* decisions concerned track inspection and a feasibility study commanded by Congress, not infrastructure projects. And in the *Canadian National* case, the Board’s interim order merely memorialized the host railroad’s commitment to continue *existing* passenger service during the pendency of the Board’s § 24308(a) terms and compensation proceeding.

⁵ See, e.g., Environmental Impact Statement for New Orleans Rail Gateway (NORG), Jefferson and Orleans Parishes, LA, Federal Railroad Administration, 77 Fed. Reg. 2120 (Jan. 13, 2012) (FRA was preparing an environmental impact statement concerning various infrastructure projects in the New Orleans region studied in a 2007 feasibility study, including a Gentilly Yard bypass track similar to the one in the Gulf Coast Working Group’s 2017 report.).

(emphasis in original). This claim cannot be reconciled with Amtrak's explicit request in the application for an order allowing it to begin making "improvements" to the line. Application at 6. Amtrak is asking that the Board order new passenger service that its own application admits would require some level of infrastructure enhancements. Such an order cannot be issued without considering the environmental consequences.

Amtrak's assertion that the Gulf Coast Working Group's recommendations will "occur without any Board order" makes little sense. Amtrak Resp. at 16. Those recommendations are plainly contingent on new passenger service and thus the Board order that Amtrak is seeking. Nor could a Board order for new service be separated from these planned "improvements." The Board's environmental review must include consideration of "those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives."⁶

Amtrak's fallback argument that it need not comply with NEPA because "Section 24308(e) requires no environmental or historic reports as a precondition to filing an application" is nonsense. Amtrak Resp. at 14. There is no explicit environmental report requirement in § 10901 for rail construction applications, in § 10903 for abandonment applications, or in § 11323 for major merger applications, but the Board plainly needs and requires environmental reports for such applications. An explicit congressional citation to NEPA is not necessary to "require[] the Board to examine the environmental effects of proposed federal actions and inform the public concerning those effects."⁷ Amtrak simply cannot get away from its basic legal obligation to give the Board the information it needs to comply with its NEPA obligation to consider the environmental impacts of its action.

Fourth, Amtrak's argument that the motion to dismiss is now "moot" because 30 days passed since it filed its Application is wrong and has been waived. In the first place, Amtrak's Application is procedurally deficient because it lacked the requisite environmental and historic reports. Thus, the Application could not have triggered § 24308(e)'s 30-day period for the Board to decide whether to hold a hearing on the record. Moreover, Amtrak has waived any argument

⁶ 40 C.F.R. § 1508.1(g) (2020); see *Bos. & Maine Corp.—Abandonment Exemption—in Worcester Cty., Mass.*, STB No. AB 32 (Sub-No. 105X), 2012 WL 2869706, at *3 (served July 13, 2012) (quoting 40 C.F.R. § 1508.7 (2012), which described cumulative impact as "the impact on the environment, which results from the incremental consequences of an action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions").

⁷ *CSX Transportation, Inc.—Joint Use—Louisville & Indiana R.R. Co., Inc.*, STB No. FD 35523, 2015 WL 3988114, at *5 (served Apr. 10, 2015) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983)); see also *Implementation of Public Law 91-190, National Environmental Policy Act of 1969 and Related Requirements*, 340 I.C.C. 431, 437 (1972) ("The NEPA has been construed by the courts to mean essentially that every Federal agency must consider ecological factors when dealing with activities which may have an impact on man's environment.").

that the motion to dismiss is now moot.⁸ CSXT and NSR filed their motion to dismiss on April 5, 2021, 20 days after Amtrak submitted its Application. Despite seeking expedited consideration of its Application, Amtrak did not promptly challenge the motion or argue that the motion would become “moot” if the Board failed to issue a decision within ten days. In its April 14 decision (Day 29), the Board noted that the “motion to dismiss raises threshold issues that must be addressed” and asked Amtrak to respond by April 26.⁹ Again, Amtrak remained silent. Amtrak did not argue that the motion would become “moot” if it were not immediately addressed before the 30-day mark. There is no basis for rewarding a party for sitting on its hands until a time period expires so that it can claim that “important threshold issues” have now become moot.

In any event, Section 24308(e)’s statement about a Federal Register notice being required if the Board “decides not to hold a hearing” is inapplicable to the motion to dismiss, which asks the Board to dismiss the Application *without prejudice*. Granting CSXT and NSR’s motion is not a decision not to hold a hearing or a final rejection of Amtrak’s claims. It is simply requiring Amtrak to meet its commitment to affected communities to complete an impact study and its regulatory obligation to comply with the Board’s environmental rules. And it is essential information for all parties to understand what would be required for Amtrak to begin its proposed Gulf Coast service without degrading freight service to the many stakeholders who depend on CSXT and NSR.

Sincerely,

/s/ Raymond A. Atkins

Raymond A. Atkins, Ph.D.

cc: FD 36496 Service List

⁸ See *Consol. Rail Corp.—Abandonment Exemption, et al.*, STB No. AB 167 (Sub-Nos. 1189X, 686X, 306X), 2017 WL 3599310, at *3 (served Aug. 21, 2017) (citation omitted) (explaining that an argument is waived by a party’s “own failure to raise the argument in good time”).

⁹ Decision at 2, Finance Docket No. 36496 (served Apr. 14, 2021).