

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(e) – CSX TRANSPORTATION, INC. AND
NORFOLK SOUTHERN CORPORATION

AMTRAK'S HEARING FORMAT PROPOSAL

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Pursuant to the Surface Transportation Board’s (“the Board’s”) August 6, 2021 Order, as modified by its October 15, 2021 Order, the National Railroad Passenger Corp. (“Amtrak”) respectfully submits its proposed hearing format for the above captioned matter. The Board’s Order directed the parties, Amtrak, CSX Transportation, Inc. (“CSX”), and Norfolk Southern Railway Company (“NS”), to confer in an attempt to develop a joint proposal on the hearing format. *See Application of the National Passenger Railroad Corporation Under 49 U.S.C. § 24308(E)—CSX Transportation, Inc., and Norfolk Southern Railway Company*, FD 36496, slip op. at 11 (STB served Aug. 6, 2021). The parties conferred and were unable to develop a joint proposal, therefore Amtrak hereby submits the following individual proposal on the hearing format.

Amtrak proposes that the Board conduct a two-part hearing. On February 15, 2022, Amtrak proposes that time be devoted to oral argument before the Board from the parties’ respective counsel. Additionally, Amtrak proposes that time be devoted to testimony from the principals of the parties, as well as other interested stakeholders that have first filed a notice expressing their intention to present their views to the Board. On February 16, 2022, Amtrak proposes, to the extent the Board would find it helpful, that time be devoted to allowing the Board

to question the parties' expert witnesses. Amtrak also proposes that the Board hold a prehearing conference with the parties at a time convenient to the Board, potentially in late January or early February 2022.

This is the Board's first proceeding under Section § 24308(e) and therefore the first opportunity for the Board to define what it means for freight transportation to be "impaired unreasonably." 49 U.S.C. § 24308(e). This proceeding and question of law are matters of first impression for the Board and the standard the Board establishes in this case will govern future cases as Amtrak implements its national strategy to grow passenger services throughout the country. The parties and the public would therefore benefit from the Board presiding over this hearing and applying its expertise to decide this case.

CSX and NS have proposed that rather than holding a hearing before the Board, an administrative law judge should preside over a trial-type proceeding followed by an appeal to the Board. But an administrative law judge from a different administrative agency, while well positioned to adjudicate discovery disputes, would not bring the same level of expertise and experience as the Board to decide this matter of first impression.¹ And requiring the parties to proceed first before an administrative law judge and then appeal to the Board would needlessly draw out these proceedings that Congress intended to proceed quickly. Having the Board preside

¹ When the then Interstate Commerce Commission (ICC), the predecessor to the Board, used administrative law judges in those procedures before deregulation of the railroad industry in 1980, it had a large number of its own ALJs (55 in 1980 – see Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 Admin. L. Rev. 109, 130 (1981)) who did nothing but conduct hearings in ICC cases and were no doubt very knowledgeable about the railroad industry and applicable precedents. But because the last ICC administrative law judge retired three decades ago, what CSX is proposing is that the decision in a major case of first impression would be made not by the Board but by a single administrative law judge from another agency who, while no doubt highly qualified to resolve the discovery disputes for which the Board borrows administrative law judges, doesn't have experience in adjudicating railroad issues or applying STB precedents.

over this hearing in the first instance would allow for an expeditious final decision in this matter as contemplated by Congress.

Amtrak's proposed hearing format would satisfy Section § 24308(e)'s requirement that the Board make a decision after a "hearing on the record." When instituting proceedings pursuant to other statutes with similar language, the Board has exercised its discretion in determining what constitutes a "hearing on the record." *Compare, e.g.,* 49 U.S.C. § 10907(c)(1) (providing that "the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record") *with KCVN, LLC and Colorado Pacific Railroad, LLC—Feeder Line Application—Line Of V and S Railway, LLC, Located In Crowley, Pueblow, Otero, And Kiowa Counties, Colorado*, FD 36005 (STB served April 15, 2016) (setting procedural schedule for proceeding under § 10907 that contains no evidentiary hearing or oral argument); *compare* 49 U.S.C. § 11121(a)(1) (requiring that the "Board may act only after a hearing on the record and an affirmative finding") *with North America Freight Car Association; American Fuel & Petrochemicals Manufacturers; The Chlorine Institute; The Fertilizer Institute; American Chemistry Council; Ethanol Products, LLC d/b/a Poet Ethanol Products; Poet Nutrition, Inc.; and Cargill Incorporated v. Union Pacific Railroad Company*, NOR 42144 (STB served Feb. 11, 2016) (setting procedural schedule for proceeding under § 11121 that contains no evidentiary proceeding or oral argument).

The Board has already received voluminous documentary evidence in this case, including opening, reply, and rebuttal evidence and the verified statements and workpapers of various experts. Amtrak's proposed hearing format will avoid the unduly repetitious presentment of evidence and also allow the Board to make an informed and expeditious decision.

CONCLUSION

Amtrak respectfully requests that the Board adopt its proposed hearing format.

December 30, 2021

Respectfully submitted:
/s/ Jessica Ring Amunson

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day served copies of this document upon all parties of record in this proceeding, by email on the service list to Finance Docket No. 36496.

December 30, 2021

/s/ Jessica Ring Amunson
Jessica Ring Amunson