

**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 PROPOSAL ON HEARING FORMAT**

Pursuant to the Board’s August 6, 2021 Decision,¹ CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) submit this pre-hearing schedule and hearing format proposal. CSXT and NSR conferred with the National Passenger Railroad Corporation (“Amtrak”) in an effort to develop a joint proposal, but were unable to reach an agreement.

This CSXT/NSR hearing format proposal has two main elements. First, CSXT and NSR strongly urge the Board to schedule a technical conference in advance of the hearing to permit the Board’s staff to explore questions they may have with the technical evidence in this case, such as CSXT and NSR’s Rail Traffic Controller (“RTC”) model and report (the “2021 Gulf Coast RTC Model”), various verified statements addressing aspects of that model, and Amtrak’s novel capacity

¹ Decision at 11, *Application of the National Passenger Railroad Corporation Under 49 U.S.C. § 24308(e)—CSX Transportation, Inc. and Norfolk Southern Railway Company*, STB Docket No. FD 36496 (served Aug. 6, 2021) (“August 6 Decision”).

analysis. Second, CSXT and NSR recommend that the Board order that the hearing be conducted pursuant to the Board's Part 1113 regulations, and that the Board designate an administrative law judge ("ALJ") as the presiding officer for such a hearing. CSXT and NSR believe that an ALJ hearing conducted under the Part 1113 rules is the best way for the Board to carry out Congress's requirement of a "hearing on the record." CSXT and NSR respectfully suggest that Administrative Law Judge Thomas McCarthy be designated as the presiding officer, as he already has familiarity with the case through his work in the discovery phase.

Technical Conference: CSXT and NSR recommend the Board schedule a technical conference with Board staff and the parties' respective experts to discuss the evidence in this proceeding. The Board has successfully used technical conferences in the past to facilitate dialogue between parties and staff about detailed technical evidence. For example, the Board utilized a technical conference in *Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.*, as a forum where Board staff could "discuss with each party how its RTC model supports its operating plan and configuration as specified in its narrative statements and workpapers."² That technical conference allowed Board staff to pose specific questions on a number of complicated topics including how the parties' trains were identified and represented in the RTC model, the "correlation between RTC

² STB Docket No. NOR 42121, at 2 (served May 18, 2015) (attached as Appendix A).

mileposts, field mileposts, and RTC nodes,” and the intricacies of train movements and interactions.³

A technical conference could be particularly helpful in this proceeding, where CSXT and NSR have submitted a detailed RTC model and report and where the Board has recognized “the importance of a study that models—in the context of the line’s present and future traffic volumes and engineering design and conditions—the specific service that Amtrak proposes in its application.”⁴

The technical conference should be scheduled before the hearing at a time that is convenient to the Board, perhaps in late January. Board staff should have the opportunity to ask questions of each party’s experts. If the Board adopts CSXT’s and NSR’s proposal below to have an ALJ-conducted hearing, Judge McCarthy should have the opportunity to participate if he wishes, and the Board staff who participate in the technical conference could be delegated to assist Judge McCarthy with any technical issues.

ALJ Hearing: CSXT and NSR respectfully recommend that the Board designate Administrative Law Judge Thomas McCarthy as the presiding officer for the hearing on the record and propose a hearing format that will facilitate the implementation of these procedural protections and lead to a fair and efficient resolution of this dispute.

³ *Id.*

⁴ August 6 Decision at 7.

Federal agencies have significant discretion to determine what procedures shall govern when a statute requires something less than a hearing “on the record.”⁵ But Congress has prescribed specific procedures in Sections 556 and 557 of the APA for “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”⁶ Here, the Board may order CSXT and NSR “to provide or allow for the operation of the requested trains” by Amtrak only after (1) “a hearing on the record” and (2) finding that the requested passenger trains would not “impair unreasonably freight transportation.”⁷ Section 24308(e)’s use of the phrase “on the record” unambiguously invokes these APA requirements.⁸

The Board has promulgated regulations implementing the procedural and evidentiary requirements of APA §§ 556 and 557 in 49 C.F.R. Part 1113 (Oral Hearing). Application of these regulations will ensure a fair and impartial hearing by safeguarding the parties’ procedural rights guaranteed by Congress in the APA.

⁵ See *Final Offer Rate Review*, STB Docket No. EP 755, Decision at 19–20 (served Nov. 15, 2021) (“[W]here a hearing on the record is *not* required, an agency has ‘considerable discretion to establish appropriate procedures.’” (emphasis added)); see also *R.R. Comm’n of Texas v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985) (collecting cases) (“A fundamental and well-recognized distinction exists between a requirement that an agency provide a ‘hearing’ and a requirement that an agency provide a ‘hearing on the record.’”).

⁶ 5 U.S.C. § 554(a); see *id.* § 554(c)(2) (“The agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with sections 556 and 557 of this title.”).

⁷ 49 U.S.C. § 24308(e)(1).

⁸ See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (“Sections 556 and 557 need be applied ‘only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be ‘on the record.’”).

The Part 1113 regulations reflect a time when this agency and its predecessor the ICC routinely used administrative law judges to conduct hearings. Indeed, APA section 556 contemplates that agencies will often use administrative law judges to “preside at the taking of evidence” in on-the-record hearings.⁹ Here, having a single ALJ decisionmaker act as the presiding Board officer over the hearing will ensure the efficient and consistent resolution of evidentiary issues and promote the development of a complete record. Judge McCarthy is well-positioned to oversee the trial-like procedures that must be followed at the hearing. Judge McCarthy is already familiar with the issues in this proceeding and has resolved discovery disputes and moved the parties to consensus on contentious issues.

CSXT and NSR have conferred with Amtrak, and understand that Amtrak’s preference is that the Board itself conduct a hearing rather than an ALJ. While it would be possible for the Board to itself conduct a hearing under the Part 1113 rules that allowed for an appropriate level of evidentiary development and cross-examination, using an ALJ to develop a hearing record is a well-established tool that the Board should consider.¹⁰

⁹ 5 U.S.C. § 556(b)(3).

¹⁰ If the Board chooses to conduct the hearing itself, it should strongly consider having Board staff conduct the technical conference discussed above in advance of that hearing. As discussed, a technical conference is an ideal forum for examination of the modeling evidence that has been presented to demonstrate why Amtrak’s proposal to introduce four daily passenger trains with no supporting infrastructure would unreasonably impair freight service.

The Board of course would continue to have the final word. Under the APA, Judge McCarthy could “initially decide the case” and the parties would retain the right to appeal that initial decision to the full Board.¹¹ Thus, the Board may utilize Judge McCarthy’s considerable litigation and adjudicatory experience while still retaining its ability to review important questions of first impression.

CSXT and NSR propose the following pre- and post-hearing schedule, rules governing the hearing, and hearing format.

Pre-Hearing Deadlines

- Technical Conference: **At the Board’s convenience**
- Witness and Exhibit Lists: **Tuesday, February 1, 2022**
- Proposed Findings of Fact and Conclusions of Law: **Tuesday, February 1, 2022**
- Pre-Hearing Conference: **Tuesday, February 8, 2022**

Rules Governing The Hearing

- Presiding Officer: Administrative Law Judge Thomas McCarthy
- Governing Rules: The hearing on the record shall be governed by the Board’s Oral Hearing regulations set forth in 49 C.F.R. Part 1113.
 - All evidence, pleadings, and comments filed in Finance Docket No. 36496 shall be deemed admitted into the record. The admission of this evidence into the record in no way shall impede Judge McCarthy’s right to determine the appropriate weight and probative value to assign to that evidence in rendering an initial decision.
 - Judge McCarthy shall have access to any resources of the Board in the execution of his role as presiding officer at the hearing and in rendering an initial decision. This access shall include the right to

¹¹ *Id.* § 557(b); *see* 49 C.F.R. § 1115.2.

attend the technical conference and to designate as an expert advisor any Board employee with special knowledge or expertise in matters relevant to the issues in this proceeding, such as modeling with Rail Traffic Controller.

- Hearing Format: The order and format of the hearing shall be determined by Judge McCarty as the presiding officer. It shall include the opportunity for all parties to present opening statements, present witnesses (including third party witnesses), cross-examine the other party's witnesses, and make closing statements.
- Post-Hearing Briefing: Judge McCarthy retains the discretion to request post-hearing briefing from the parties on specific issues that arise during the hearing or to request proposed findings of fact and conclusions of law.
- Appeals: Any appeal of Judge McCarthy's initial decision shall be made in conformity with the Board's Part 1115 regulations

CONCLUSION

CSXT and NSR respectfully request that the Board schedule a technical conference, designate Administrative Law Judge Thomas McCarthy as the presiding officer for the hearing on the record, and adopt the above-proposed hearing schedule and format.

Respectfully submitted,

/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.

/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*

Dated: December 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2021, a copy of the foregoing Proposal on Hearing Format was served by email or first class mail on the service list to Finance Docket No. 36496.

/s/ Raymond A. Atkins

Raymond A. Atkins
SIDLEY AUSTIN LLP

Appendix A

SERVICE DATE – MAY 18, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ The parties are directed to attend a technical conference with Board staff to discuss the operating plan and Rail Traffic Controller model evidence submitted in this rail rate reasonableness proceeding.

Decided: May 15, 2015

On May 3, 2010, Total Petrochemicals & Refining USA, Inc. (TPI), filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT), for transportation between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. TPI seeks rate relief using the Board's Stand Alone Cost (SAC) methodology. Following the Board's decision in the market dominance phase of this proceeding, the parties have submitted rate reasonableness evidence, but the Board held the deadline for filing final briefs in abeyance pending resolution of TPI's November 5, 2014 petition to supplement the record.

The Board has determined that a technical conference is necessary to discuss the parties' operating plan and Rail Traffic Controller (RTC) model evidence. How a stand-alone railroad (SARR) would operate influences both its configuration and annual operating expenses. AEP Tex. N. Co. v. BNSF Ry., NOR 41191, slip op. at 16 (Sub-No. 1) (STB served Sept. 10, 2007), reconsideration denied (STB served May 15, 2009), vacated on other grounds and remanded sub nom. AEP Tex. N. Co. v. STB, 609 F.3d 432 (D.C. Cir. 2010). Although the operating plan must be able to meet the transportation needs of the traffic to be served, it need not match the existing practices of the defendant railroad, as the objective of the SAC test is to determine what it would cost to provide the service with optimal efficiency. The assumptions used in the SAC analysis, including the operating plan, nonetheless must be realistic, i.e., consistent with the underlying realities of real-world transportation. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 16 (STB served Nov. 22, 2011). The RTC model supports the operating

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

plan by demonstrating the adequacy of the configuration and providing transit times and mileage-based service units.

Each party should be prepared to discuss its operating plan and RTC model. In particular, Board staff will discuss with each party how its RTC model supports its operating plan and configuration as specified in its narrative statements and workpapers. In addition, parties should be prepared to discuss: (1) whether the RTC model is sufficient to support all the necessary trains identified in the parties' submissions; (2) how the parties' train list(s) are represented in the RTC model; (3) the identification of trains in the RTC model; (4) the correlation between RTC mileposts, field mileposts, and RTC nodes; (5) the availability of the model's track-mile totals for mainline, sidings, yards, and industry leads; and (6) timing issues associated with "leapfrog" train segments that begin before preceding leapfrog train segments have ended.

The technical conference will be held by May 27, 2015, at the Board's headquarters located at 395 E Street, S.W., Washington, DC. Board staff will be in contact with the parties to schedule the exact date and time. The parties should be represented by their legal counsel and should have their relevant consultants in attendance.

It is ordered:

1. A technical conference will be held by May 27, 2015, at the Board's headquarters located at 395 E Street, S.W., Washington, DC, as described above.

2. This decision is effective on the date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.