

**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**

**JOINT OPPOSITION TO AMTRAK’S MOTION FOR LEAVE TO FILE
SURREBUTTAL AND PROPOSED SURREBUTTAL**

On February 1, 2022—six weeks after rebuttals were filed—the National Passenger Railroad Corporation (“Amtrak”) filed a combined Motion for Leave to File Surrebuttal (the “Motion”) and supplemental evidence styled as a Proposed Surrebuttal (“Surrebuttal”).¹ Amtrak’s Motion is improper, untimely, and unjustified. In the first place, Amtrak waited until February 1, 2022 to file a Motion addressed to Rebuttal evidence filed on December 23, 2021. The Board’s regulations are clear that (absent a different procedural schedule specified by the Board) any motion addressed to a pleading must be filed within 20 days of that pleading. Here, Amtrak’s Motion was filed long after that deadline. And far from being authorized by an overriding procedural schedule, Amtrak’s filing appears almost calculated to blow up the carefully crafted schedule that the Board put in place. Hours before Amtrak chose to file its Motion, the Board indicated that it would allow the public to comment on the evidence in the record at a February 15–16 hearing, followed by

¹ Amtrak’s Motion for Leave to File Surrebuttal and Proposed Surrebuttal, *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 (filed Feb. 1, 2022) (“Amtrak’s Motion”), at 1.

an evidentiary hearing beginning March 9. The Board provided for no additional written evidence.

Moreover, Amtrak's Motion is utterly meritless. The Board only grants motions to strike or to allow additional responses to rebuttal evidence in rare circumstances when the rebuttal contains information that should have been presented on opening. Here, Amtrak seeks the right to "surrebut" nearly the entirety of the Rebuttal filed by CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR"). For example, Amtrak seeks to "surrebut" CSXT's and NSR's responses to Amtrak's critiques of their RTC evidence; CSXT's and NSR's responses to Amtrak's extreme statutory argument; and even CSXT's and NSR's responses to Amtrak's introduction of a new string-line model. Allowing "surrebuttal" under these circumstances would turn the Board's precedents on their head and violate general principles of fairness and due process.

If the Board nevertheless were to grant Amtrak's Motion and accept the Surrebuttal, CSXT, NSR, and the Port of Mobile² (together, the "Joint Parties") request leave to file responses to the Surrebuttal. If the Board agrees with Amtrak that the Board would be assisted by "having Amtrak's position on the new arguments and evidence that CSX and NS has offered for the very first time in their rebuttal filing,"³ then the Board should be equally assisted by having the Joint Parties' positions on the new arguments and evidence that Amtrak introduces for the first time in its surrebuttal filing.⁴ The Joint Parties should be afforded at least

² The Port of Mobile consists of the Alabama State Port Authority and its rail common carrier operating division, Terminal Railway Alabama State Docks.

³ Amtrak's Motion at 1.

⁴ For example, Amtrak for the first time discusses using a program called "Tableau" for much of the work measuring theoretical capacity and to schedule train operations. Surrebuttal, Exhibit 2 – Verified Statement of Clayton Johanson,

20 days from the time of any Board order granting Amtrak's Motion to file responses to any portion of the Surrebuttal that is accepted. If the Board were to grant the Motion and thus essentially permit an additional round of written evidence, it should also reschedule the evidentiary hearing scheduled for March 9, 2022, to allow the Joint Parties, Amtrak, and the Board time to prepare in light of these new filings. The interference that Amtrak's Motion would cause for the procedural schedule is an additional reason to deny Amtrak the right to file this eleventh-hour surrebuttal.

I. Nothing Justifies Amtrak's Improper and Extensive Surrebuttal.

CSXT and NSR's Rebuttal does nothing more than rebut Amtrak's reply argument and evidence. Amtrak wrongly asserts that it has the right to a surrebuttal if the Rebuttal filing extends beyond the evidence and argument contained in CSXT and NSR's "opening evidence."⁵ Amtrak insists, by extension of the logic of its Motion, that the Joint Parties somehow should have anticipated the substance of Amtrak's Reply Evidence and Argument and included their responses to Amtrak in the Opening Evidence. But that is not how it works. It is beyond obvious, and it is inherent to the concept of a rebuttal filing, that CSXT and NSR's Rebuttal would have arguments responsive to Amtrak's Reply that differ to some extent from CSXT and NSR's Opening Evidence.⁶

Michael Weaver, and Darkhan Mussanov at 8.

⁵ Amtrak's Motion at 2.

⁶ Even if CSXT and NSR "change[d] [their] position" in their Rebuttal (which they did not), that would not justify the Surrebuttal. As the parties with the burden of proof, CSXT and NSR have every right to adjust or change their position at the close of the evidence. And that is precisely what CSXT and NSR's Rebuttal was (or at least was intended by the Board to be): the close of the written evidence.

In fact, there is no requirement, as Amtrak suggests, that a party's rebuttal evidence must be limited to the content of its opening evidence (which would, of course, be absurd).⁷ Instead, as long as any new arguments or evidence in a rebuttal are responsive to the reply, they are proper and rightly conclude the written evidentiary submission phase of the proceeding. As the Board has explained: "The Rules of Practice limit 'rebuttal statements . . . to issues raised in the reply statements to which they are directed.' 49 C.F.R. § 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument."⁸ For example, in stand-alone cost rate cases, the Board has given parties wide latitude in rebuttal filings to respond to the reply evidence.⁹

⁷ *Id.* (stating that its Amtrak's Surrebuttal would address "CSXT's and NSR's claims . . . data . . . and new verified statements, none of which were submitted as part of CSX's and NS's opening evidence or workpapers").

⁸ *Potomac Electric Power Co. v. CSX Transp., Inc.*, STB Docket No. NOR 41989 (STB served Nov. 24, 1997), slip op. at 5 (in-text regulation citation edited); *see also Bituminous Coal—Hiawatha, Utah to Moapa, Nevada; Aggregate Volume Rate on Coal—Acco, Utah to Moapa, Nevada*, ICC Docket Nos. 37038; 37409 (Nov. 30, 1988), slip op. at 10 ("Protestant attacks the railroads' rebuttal statements as improper on grounds that they contain new evidence. There is no bar to the presentation of new evidence on rebuttal, however, as long as it is responsive to the reply.").

⁹ *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42142 (served Dec. 9, 2016), at 3 (in rebuttal filings a shipper "may demonstrate that its opening evidence was feasible and supported, it may adopt the railroad's evidence, or in certain circumstances it may offer to refine its evidence to address issues raised by the railroad regarding its opening evidence") (quoting *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003)); *see Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry.*, STB Docket No. NOR 42130 (served June 20, 2014), at 9 ("Corrective evidence is appropriate on rebuttal if the complainant shows that the reply evidence is unsupported, infeasible, or unrealistic.").

Second, Amtrak’s claim that CSXT/NSR’s rebuttal contains “misstatements about Amtrak’s capacity analysis”¹⁰ is wrong. And even if that were true, Amtrak could correct those alleged misstatements during the evidentiary hearing on the record currently scheduled for March. Indeed, the Board has denied requests to file a surrebuttal in proceedings where the Board orders oral argument or a hearing because doing so offers the party without the final written word an opportunity to respond.¹¹

Third, the cases cited by Amtrak do not justify its extensive Surrebuttal. In fact, those cases support rejection of the Surrebuttal as prejudicial and abusive of the Board’s processes, absent Board permission for the Joint Parties separately or collectively to respond substantively to the Surrebuttal as a means to close the written phase of the record. For example, in *Brotherhood of Maintenance of Way Employees*, the Board accepted two surrebuttal filings, reasoning that “no party would be harmed by [their] admission.”¹² That rationale, however, certainly does not apply here—giving Amtrak the last word in this proceeding is directly contrary to principles of procedural fairness. It is not as if Amtrak has filed a two-page letter clarifying some discrete point of evidence—its Surrebuttal is, in total, over forty pages, and includes new evidence and two new verified statements. And the statute in this case places the burden of proof on the Joint Parties, compounding the procedural unfairness of denying them an opportunity to respond substantively.

¹⁰ Amtrak’s Motion at 2.

¹¹ See, e.g., *Desertxpress Enters., LLC—Petition for Declaratory Order*, STB Docket No. FD 34914 (served May 7, 2010), slip op. at 5 (denying requests to “submit a reply to Petitioner’s rebuttal” (a surrebuttal) because doing so “will not prejudice them” “in view of the opportunity for each party to present oral argument”).

¹² *Bhd. of Maint. of Way Emps. & Soo Line System Div., Bhd. of Maint. of Way Emps. v. Soo Line R.R. Co. & Wisconsin Cent. Ltd.*, 3 S.T.B. 1076, 1077 n.4 (1998).

The Board in *Tri-City Railroad Company* confirmed this very point. There, the Board acknowledged that accepting a surrebuttal would “prejudice[]” the party with the burden of proof, unless the party with the burden were to be afforded the chance to “rebut” the surrebuttal.¹³ Thus, if the Board accepts the Surrebuttal, it must also permit the Joint Parties the opportunity to “rebut [Amtrak’s] supplemental filing.”¹⁴ Likewise, in *National Railroad Passenger Corporation & Consolidated Rail Corporation*, the ICC conditioned its acceptance of an Amtrak surrebuttal filing upon extending to Conrail (the party with the burden of proof) the right to “respond to the surrebuttal evidence.”¹⁵ Certainly, it would be manifestly unfair to permit Amtrak to have the last word, particularly one that is over forty pages long.¹⁶ This is particularly true given that Amtrak urged the Board to limit any hearing in this case to two days rather than schedule a separate technical conference (as suggested by CSXT and NSR) on the grounds that the Board had “already received voluminous documentary evidence in this case, including opening, reply, and rebuttal evidence and the verified statements and workpapers of various experts.”¹⁷ Amtrak was completely silent in that filing as to its intentions to

¹³ *Tri-City R.R. Co.—Pet. for Declaratory Order*, STB Docket No. FD 35915 (served Aug. 31, 2015), slip op. at 2.

¹⁴ *Id.*

¹⁵ *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(A) of the Rail Passenger Service Act for an Order Fixing Just Compensation*, ICC Docket No. FD 32467, 1995 WL 67109, at *1 (served Feb. 17, 1995).

¹⁶ *See, e.g., People v. Caballero*, 102 Ill.2d 23, 48 (1984) (explaining that “[if] . . . rebuttal comments . . . are properly limited to their intended purpose, there [is] no reason to permit . . . further [briefing]”); *Administrator v. John Doe*, 3 N.T.S.B. 516, 518 (1978) (Because “the petitioner had the burden of proof[,] . . . he was entitled to final summation”).

¹⁷ Amtrak’s Hearing Format Proposal, *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. and Norfolk S. Corporation*, STB Docket No. FD 36496 (filed December 30, 2022), at 3.

supplement the record with additional written evidence, and to do so late in the proceeding so as to prevent the Joint Parties from having sufficient time to respond before the February 15 hearing.

II. The Board Must Ensure Fairness in this Proceeding.

Even if Amtrak's Motion had merit (which it plainly does not), it must be rejected because it violates the Board's rules. The Board's rules clearly state that any "motion addressed to any pleading" must be filed "within 20 days after the pleading is filed with the Board."¹⁸ Amtrak's Motion simply ignores this rule (as Amtrak has previously).¹⁹ The Board has "emphasize[d]" that motions addressed to pleadings should be filed within the 20-day time period of 49 C.F.R. § 1104.13(a).²⁰ Amtrak has offered no explanation for its delay and the Board should reject its Motion for that reason alone. And in this proceeding, the Board made it clear that "any further requests to extend the procedural schedule, even when agreed to, will be scrutinized closely, and [the parties] should not assume that further extensions will be routinely granted."²¹

¹⁸ 49 C.F.R. § 1104.13(a).

¹⁹ See, e.g., Port's Rebuttal Comments and Evidence, *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 (filed Dec. 23, 2022), at 4 & n.3 (noting that, in an effort to have the Board block the Port's formal participation in this proceeding and to ignore the Port's evidence, Amtrak moved to strike the Port of Mobile's opening and reply evidence well after the procedurally allotted 20-day reply deadline, and Amtrak also registered an untimely opposition to the Port's request for leave to intervene); CSXT and NSR's Reply to Motion to Strike, *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 (filed Dec. 27, 2022), at 4 (same).

²⁰ *Consumers Energy*, STB Docket No. NOR 42142, at 2.

²¹ 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. 15, 2021), slip op. at 1.

Amtrak's late Motion also undermines the Board's carefully crafted hearing schedule set forth in its February 1, 2022 order. The Board repurposed the original date for the hearing on the record to accept public comment from interested persons who may be impacted by the Board's resolution of this proceeding.²² This public comment portion of the proceeding is to be followed by a pre-hearing conference on February 16, 2022, with the evidentiary hearing on the record to commence on March 9, 2022.²³ Not only has Amtrak's Motion distracted the parties and the Board from preparing for the two stages of the hearing, it also jeopardizes the March 9 evidentiary hearing. If the Board accepts Amtrak's Surrebuttal, the Joint Parties will require time (20 days) to respond, which will in turn cut into the time they should be preparing for the evidentiary hearing. And Amtrak will undoubtedly demand sufficient time to review the Joint Parties' response(s) in preparation for the evidentiary hearing.

The Board should reject Amtrak's Motion in order to preserve the Board's two-stage hearing schedule. The interested persons who are participating in the February 15 public hearing are preparing their comments on what they believe is a complete and closed written record. Finally, Amtrak will not be prejudiced if the Board denies its Motion because Amtrak will have an opportunity at the March evidentiary hearing to respond to CSXT and NSR's Rebuttal. Indeed, this proceeding is unique compared to the many Board decisions based solely on a written record precisely because both parties will have opportunity to respond to the full written record at an evidentiary hearing.

²² 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 Feb. 1, 2022), at 2.

²³ *Id.*

CONCLUSION

For the reasons set forth above, the Board should deny Amtrak's Motion and reject its Surrebuttal. If the Board nevertheless were to grant Amtrak's motion and accept its Surrebuttal, the Board should also permit the Joint Parties 20 days from the time of any Board order granting the Motion to file responses (or to file jointly if they so choose), as they are entitled to do as the parties bearing the burden of proof. And, in so doing, the Board should also reschedule the evidentiary hearing (March 9–10, 2022) to allow all parties and the Board sufficient time to then prepare for the evidentiary hearing.

Respectfully submitted,

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Dated: February 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2022, a copy of the foregoing Joint Opposition to Amtrak's Motion for Leave to File Surrebuttal and Proposed Surrebuttal was served by email or first-class mail on the service list for Finance Docket No. 36496.

/s/ Raymond A. Atkins

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