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April 1, 2022

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496

Dear Ms. Brown:

Norfolk Southern Railway Company ("NSR") hereby files, via e-filing, its "Pre-Hearing Brief Addressing The Issues Raised In The Board's March 14 Order." The filing is being filed as both a Public Version and a Highly Confidential Version. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

PUBLIC VERSION

**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 RAILWAY COMPANY**

**NORFOLK SOUTHERN RAILWAY COMPANY’S PRE-HEARING BRIEF
ADDRESSING THE ISSUES RAISED IN THE BOARD’S MARCH 14 ORDER**

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April 1, 2022

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On March 14, 2022, the Board served a decision directing the Parties¹ to be prepared to address five legal issues. While the decision requested the Parties to address the issues identified in the decision at the hearing, the Parties have all jointly agreed to submit pre-hearing briefs on or about April 1. Norfolk Southern Railway Company (“NSR”) respectfully submits this pre-hearing brief to address the five issues questions raised in the Board’s decision. NSR also requests the ability to file reply comments to any of the other pre-hearing briefs submitted by the other Parties.

- 1. On February 18, 2022, in response to a request from the Board at the prehearing conference, Amtrak filed under seal copies of its operating agreements with CSXT and NSR. How do the agreements apply to the matters in dispute in this case and what, if any, steps have been taken by the Parties pursuant to the agreements? Are any additional steps contemplated to be taken by any of the Parties pursuant to these agreements?**

The operating agreement between NS and Amtrak governing the operations of Amtrak on lines of NSR (the Amended and Restated Off-Corridor Operating Agreement between Norfolk Southern Railway Company and National Passenger Railroad Corporation, dated February 1, 2006, as amended, the “NS Off-Corridor Agreement”) informs the issues in this proceeding, but it does not prescribe specific steps to be taken by the Parties. Amtrak has the right to request access and amendments to the NS Off-Corridor Agreement to include additional routes, trains, and services, and if agreed to, the routes covered would be integrated into the NS Off-Corridor Agreement and any appropriate changes would be made to the NS Off-Corridor Agreement to deal with the specifics of the added service, including any necessary changes to Appendix II, Appendix IV, Appendix IV Table 1, and Appendix V.

¹ “Parties” shall have the meaning set forth in the Board’s March 14 decision.

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The service that is covered by the dispute in this proceeding, however, is not specifically covered by the NS Off-Corridor Agreement (“Agreement”) because Section 3.2(a) of the Agreement requires such a request to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Generally, and pursuant to past practices and understandings, requests for modifications or expansions of service to be integrated into the Agreement are preceded by the conduct of an RTC study, as well as any preliminary engineering and other evaluations, to ensure that the prerequisites to modification or expansion are understood and implemented before the formal request is made. These RTC studies and the conduct of preliminary engineering for any associated infrastructure additions (including but not limited to stations, tracks, and signals) are often performed directly with states for state-supported services prior to any request by Amtrak for a modification to the Agreement.

Here, that process was not followed. Amtrak did not invoke the application of the NS-Agreement. Likewise, NSR was not approached by the state sponsor of the proposed Amtrak service, that sponsor being either the Southern Rail Commission (“SRC”) or the collective members of the SRC, namely the States of Mississippi, Louisiana and Alabama. Indeed, the State of Alabama opposes Amtrak’s proposed new service from New Orleans to Mobile. At no time did Amtrak seek to follow the procedures of the Agreement nor invoke it. NSR has no ability to force Amtrak to invoke those provisions, which are rights granted to Amtrak if Amtrak seeks to add additional routes and services. If Amtrak were to invoke the Agreement, or the Board were to order Amtrak to pursue its remedies under the Agreement before seeking Board imposed access, NSR would be willing to work in good faith under the relevant provisions,

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pursuing, among other things, the avoidance of unreasonable interference with the adequacy, safety, and efficiency of NSR's other railroad operations. NSR would act in line with the long-standing and proven understandings and processes for the introduction of new Amtrak service.

2. Do the terms of section 5.1E of Amtrak's agreement with CSXT and the similar terms of section 5.1(e) of Amtrak's agreement with NSR apply to Amtrak's application in this proceeding?

No. The language in the referenced provisions deals with the [REDACTED]

[REDACTED]
[REDACTED] If a new or modified service is introduced and agreed to by Amtrak and NSR pursuant to the Agreement, the [REDACTED] is to be determined in much the same manner as for service on the rest of the system.

Introduction of new or expanded services, however, may come with additional infrastructure or other considerations, and that is specifically anticipated in other sections of the agreement. In fact, in Section 3.2, Modification of the Services, the Agreement specifically anticipates dealing with the effect on NSR's freight rail service, and explicitly in the context of the need to give Amtrak trains preference where it states:

[REDACTED]

Accordingly, if Amtrak (or a state sponsor of Amtrak service) were to invoke its rights and obligations under the Agreement, NSR would undertake its standard process of conducting an RTC study, as well as any preliminary engineering and other evaluations, to ensure that the prerequisites to modification or expansion are understood and implemented before the formal

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request is made. These RTC studies and the conduct of preliminary engineering for any associated infrastructure additions (including but not limited to stations, tracks, and signals) would be performed directly with states for state-supported services prior to any request by Amtrak for a modification to the Agreement or with Amtrak itself. Amtrak chose not to invoke its rights under the Agreement.

- 3. If the Board were to determine that CSXT and NSR failed to demonstrate that the additional trains as proposed by Amtrak would “impair unreasonably freight transportation,” see 49 U.S.C. § 24308(e)(2)(A), and the Board ordered CSXT and NSR to provide or allow for the operation of the additional trains, may the Board, in accordance with § 24308(e)(3), also require the construction of additional infrastructure under its authority to “prescribe reasonable terms and compensation for using the facilities and providing the services” pursuant to § 24308(a)?**

Preliminarily, NSR maintains that 49 U.S.C. § 24308(e) is inapplicable to the present situation. Section 24308(e) provides for an expedited procedure for Amtrak to seek “the operation of *additional* trains over a rail line of the carrier.” 49 U.S.C. § 24308(e) (emphasis added). The Oxford Dictionary defines “additional” as “added, extra, or supplementary to what is already present or available.” There is no “present” Amtrak service between New Orleans and Mobile. Instead, Amtrak seeks an entirely new route and service, one that has not before existed. Therefore, Amtrak does not seek “additional” service, but rather “new” service. As such, 24308(e), is not the correct statute to govern new service on a rail line. Instead, 49 U.S.C. § 24308(a) lays out the more fulsome process by which Amtrak may seek “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.” 49 U.S.C. § 24308(a)(1). Because Amtrak does not have existing service on the line at issue, it should have brought this action under 49 U.S.C. § 24308(a).

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The Supreme Court has held that, “in all cases involving statutory construction, ‘our starting point must be the language employed by Congress.’” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 1537 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Further, “we assume ‘that the legislative purpose is expressed by the ordinary meaning of the words used.’” *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

Congress’s use of the word “additional” implies adding to an *existing* service. See *Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18, 26 (D.D.C. 2019) (“[T]he word ‘additional’ means: ‘in addition to something else; added, extra, supplementary.’”) (quoting Oxford English Dictionary (3d ed. 2010)). This definition naturally suggests that there must be something “already present.” It would be illogical to say “he is going to buy an additional car” if one does not already own at least one car. Likewise, it would be illogical to claim that Amtrak is seeking “the operation of *additional* trains over a rail line of the carrier,” as is contemplated by 49 U.S.C. § 24308(e), unless there were *existing* “trains over a rail line of the carrier.” “Thus ‘[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’” *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Legislative history also suggests that Congress was thinking about adding additional trains to existing traffic, not adding to zero traffic. Congress’s basic concern was that “in the past Amtrak’s efforts to *add or modify services*” have been stymied, and it “is important that Amtrak have available to it *an expedited procedure for making necessary modifications or additions to its operations.*” H.R. Conf. Rep. No. 96-1041, at 42, 1980 U.S.C.C.A.N. at 1203 (emphasis added). This discussion—including the point that subsection (e) was intended to

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create an expedited procedure, presumably to supplement subsection (a)’s full-dress process—suggests that subsection (e) applies only where Amtrak seems to “add [to] or modify” existing service.

Further, Congress noted a specific example of “lack of railroad cooperation,” which apparently inspired what is now subsection (e): “the refusal of the Santa Fe Railroad to permit Amtrak to operate an *additional* passenger train on Santa Fe tracks in the densely populated Los Angeles-San Diego corridor.” H.R. Rep. No. 96-839, at 20–21 (Mar. 20, 1980) (emphasis added). This example Congress noted involved a specific line that already carried passenger traffic. H.R. Rep. No. 96-839, at 20–21.

Nonetheless, the Board did not dismiss Amtrak’s invocation of Section (e), which it should have. Having not dismissed the proceeding, if the Board does not believe it has inherent authority to impose infrastructure under Section (e),² the Board should use the existing record and convert this proceeding to a Section 24308(a) proceeding and then allow the Parties to further comment and supplement the record under the statutory requirements of that section. Under that section, there is no question that the Board has the authority to order the construction of additional infrastructure. Subsection 24308(a) authorizes the Board to “prescribe reasonable

² Absent a specific statutory prohibition or guidance on its conditioning authority, NSR believes the Board does have inherent authority under its general conditioning powers and plenary authority to impose whatever conditions it deems appropriate on any decision it renders under Section 24308(e) to avoid irreparable harm—such as the burden, disruption to freight service, and potential loss of income to NSR that would result from the imposition of new service on NSR’s lines without the requisite infrastructure improvements.. *Cf.*, 49 U.S.C. § 1321(b)(4) (providing that the Board may “when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.”). There is no specific prohibition against imposing conditions on any authority it grants under Section (e). Nonetheless, as noted above, if the Board believes it lacks authority under Section (e) to impose infrastructure, it should convert this proceeding to a Section 24308(a) case, which gives the Board the authority to impose infrastructure.

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terms and compensation for using the facilities and providing the services” that a carrier makes available to Amtrak; pursuant to this language permits, the Board may order the construction of infrastructure in three ways:

First, “reasonable . . . compensation” may include the construction of infrastructure. “Compensation,” in ordinary usage, is not limited to monetary payments, but can also include “an exchange of benefits or a *quid pro quo*.” *See, e.g., Regents of Univ. of Cal. v. Public Empl. Rel. Bd.*, 485 U.S. 589, 599 (1988) (noting that “compensation” may consist of railroads providing services for one another); *see also id.* at 602 (discussing a federal regulation stating that “compensation” may include “non-monetary valuable consideration”).

Second, 24308(a) also allows for the provision of “reasonable terms,” which Courts have interpreted to give a federal agency “broad conditioning power.” *See, e.g., Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1128 (D.C. Cir. 1979) (explaining that Natural Gas Act § 7—which allows FERC to “attach . . . such reasonable terms and conditions as the public convenience and necessity may require” to a regulatory approval—is “broad indeed”); *see also ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (“This conditioning authority is ‘extremely broad.’”); *United Air Lines v. Civil Aeronautics Bd.*, 569 F.2d 640, 650 (D.C. Cir. 1977) (similar).

Third, 49 U.S.C. § 24308(e)(3) specifically provides that, unless the parties have agreed on compensation “for additional trains provided under an order under this subsection, the Board shall decide the dispute under subsection (a).” Accordingly, if the Board enters an order under subsection (e), it “shall” apply subsection (a), which provides for the building of infrastructure. In other words, the Board may order the construction of additional infrastructure *to the extent necessary* to facilitate Amtrak’s access, reasonably compensate the freight carriers, and avoid

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unreasonable impairment—indeed, the Board must do so—and, because this construction is necessary only to provide and compensate for Amtrak’s access, Amtrak must pay for it. *See also, Application Of The National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company*, FD 35743, 2019 STB LEXIS 292, *51 (STB served Aug. 9, 2019) (noting that "incremental costs are those costs that CN has actually incurred, and that CN would not have incurred 'but for' the presence of Amtrak.")

- 4. If the Board were to find that CSXT and NSR demonstrated that the additional trains as proposed by Amtrak would “impair unreasonably freight transportation” without some measure of additional infrastructure, could the Board nevertheless order CSXT and NSR to provide or allow for the operation of the additional trains, subject to the construction of additional infrastructure determined by the Board, either under § 24308(a) or otherwise?**

Yes, the Board could order CSXT and NSR to provide or allow for the operation of the additional trains, subject to the construction of additional infrastructure, if it found that CSXT and NSR demonstrated the additional trains as proposed by Amtrak would “impair unreasonably freight transportation.” As explained above, subsection (a) provides the Board with the authority to “prescribe reasonable terms and compensation” for Amtrak access. 49 U.S.C.

§ 24308(a)(2)(A)(ii). That power includes the ability to order the construction of infrastructure.³

Further, Congress’s stated intention in passing subsection (e) was to ensure that additional Amtrak service “may be added where no significant impairment of freight operations is demonstrated.” H.R. Conf. Rep. 96-1041, at 42–43, 1980 U.S.C.C.A.N. 1183, 1203. It follows then that Congress did not intend additional Amtrak service to be added if it would

³ This is especially the case given that NSR and CSXT not only have to meet any contractual obligations for Amtrak performance over their respective lines, but also the Customer On-Time-Performance ("OTP") responsibilities imposed by the Metrics and Minimum Standards of Part 273 of 49 C.F.R. If NSR is ordered to grant access without any additional infrastructure, NSR will be unable to fulfill its regulatory requirements under the OTP rules without unreasonably and adversely impacting its freight operations and obligations.

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unreasonably impair freight-rail operations. Accordingly, if the Board finds that Amtrak service would unreasonably impair freight transportation, the Board must deny Amtrak's application outright or, in the alternative, order measures sufficient to avoid the impairment.⁴

5. If the Board were to order that CSXT and NSR provide or allow for the operation of additional trains and that additional infrastructure be constructed, may the Board, under § 24308(a), determine which party bears the cost of constructing which infrastructure projects or otherwise apportion the costs of additional infrastructure?

Under 49 U.S.C. § 24308(e)(3), if Amtrak did not agree to pay for this work, compensation would be determined under subsection (a). “[R]easonable . . . compensation” under subsection (a) would require Amtrak to pay for any work needed to prevent the impairment that its service would otherwise create. If the Board were to order CSXT and NSR to provide or allow for the operation of additional trains and that additional infrastructure be constructed, that the language of the statute plainly states and intends for the costs associated "but for" Amtrak's service to be borne by Amtrak, not the freight carriers. *See Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(a)—Union pacific Railroad Company and Southern Pacific Transportation Company*, 1998 STB LEXIS 144, *5-6, 3 S.T.B. 143 (1998) (holding that if “Amtrak and UP/SP fail to agree to the terms of Amtrak’s access, then, pursuant to 49 U.S.C. 24308(a)(2)(A)(ii), we are available to prescribe compensation” for costs associated with “additional infrastructure investment” needed for Amtrak’s expanded service).

⁴ Moreover, the measure to avoid impairment should be undertaken prior to the initiation of Amtrak service. Subsection (e) allows the Board to order a carrier “to provide or allow for the operation of the requested trains.” *See* 49 U.S.C. § 24308(e)(1). If the Board finds that Amtrak’s proposed service would unreasonably impair freight operations, then before the service begins, “adequate preparation” for that service would require constructing any infrastructure necessary to avoid such impairment.

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Notably, there is no apportionment language provided under section 24308, and the Supreme Court has previously held that words that are absent from a statute are usually affirmative and intentional, recognizing that Congress will review and “vote on the language” before enactment. *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2003). Because the Board’s power to order infrastructure construction in this proceeding extends only as far as necessary to accommodate Amtrak’s new service and compensate the freight railroads, the Board cannot order the construction of any infrastructure that goes beyond what Amtrak itself must pay.⁵

CREW QUALIFICATION QUESTION

While not one of the five questions set forth in the Board’s March 14 decision, the decision also noted that on February 10, 2022, Amtrak filed a renewed request for an interim order requiring NSR to provide Amtrak with access to NSR’s rail lines so Amtrak can begin scheduling crew qualification trains for the Gulf Coast service. NSR replied to that request on February 28, 2022. The decision asked NSR to be prepared to address this request at the evidentiary hearing.

NSR has not refused to provide Amtrak access to its lines to qualify engineers. Crew qualification generally consists of familiarization of the crew with the routes, infrastructure, and characteristics of the line over which operations will be performed to ensure safe operations, which is critically important to all occupants of the line – the freight service, the community

⁵ Under other statutory authority, the costs Amtrak incurs in providing certain services are further allocated among states and other entities on behalf of whom that Amtrak service is provided. Although it is not within the statutory authority of the Board to further allocate the costs that Amtrak would incur in introducing and sustaining its service over time, the Board is allowed to take that into consideration in making its decisions in this proceeding. It is NSR’s understanding that the service anticipated to be introduced is so-called “state-supported service,” which is to be financially subsidized by either the SRC or its member states. It is further NSR’s understanding that the State of Alabama does not support this service.

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through which service will be performed, and the passengers being transported. Qualifications can expire over time due to inactivity or modification of the infrastructure over which the service is being performed.

Although NSR believes that qualification runs are premature for a number of reasons, NSR has not refused Amtrak's request to qualify its crews. Instead, NSR has asked Amtrak for a detailed qualification plan that includes the frequency, duration, and specific route segments over which Amtrak wishes to qualify its employees. Amtrak has thus far not responded to that request for additional details.

Currently, however, it is premature for Amtrak to qualify its crews. Until the Parties know what, if any infrastructure, will be built as part of the proposed new service, and until that infrastructure is built, there is no need to qualify crews based upon existing infrastructure. More importantly, given the uncertainty of when this service is going to start, the crew qualifications may expire between the time of the qualification runs and the start of the service, which then would require an additional qualification run. At the appropriate time, NSR will of course provide Amtrak with access for its crew qualification.

CONCLUSION

If necessary, NSR is prepared to address these and any other relevant questions at the evidentiary hearing. NSR also requests that it be provided with an opportunity to reply to any pre-hearing brief submitted by any other Party.

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Respectfully submitted,

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