

PUBLIC VERSION

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

**CSX TRANSPORTATION, INC.'S PRE-HEARING BRIEF ADDRESSING
THE ISSUES RAISED IN THE BOARD'S MARCH 11 ORDER**

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INTRODUCTION

The Board served a decision on March 14, 2022 directing the parties to “be prepared to address” five specific legal issues. CSX Transportation, Inc. respectfully submits this pre-hearing brief to address those issues.

I. CSXT’s operating agreement with Amtrak does not apply here because Amtrak chose to pursue relief at the Board.

The Board first asked: “How do [Amtrak’s operating agreements with CSXT and NSR] apply to the matters in dispute in this case . . . ?”¹ CSXT’s operating agreement with Amtrak does not apply here. Certain provisions in that agreement could apply to Amtrak’s request to add the service at issue, but while Amtrak first invoked the contractual process, it abandoned that process and instead pursued this proceeding, waiving its right to arbitrate under the agreement. Thus, no more steps under the contract are contemplated now.

A. The operating agreement does not govern this dispute because the parties have proceeded before the Board.

Certain provisions in the CSXT-Amtrak operating agreement could apply to Amtrak’s request here, but Amtrak chose to proceed before the Board instead, and thus waived applying these contractual provisions.

When Amtrak first proposed adding the Gulf Coast service in January 2021, it invoked the operating agreement’s provisions. Amtrak “request[ed] CSXT’s agreement” to the service and “proposed that” its “payments” for the service “be in

¹ March 14 Decision at 1–2.

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accordance with Section 5.1.B of the Agreement.”² Section 5.1.B { Redacted

} Amtrak’s request thus invoked

Section 3.2A, which { Redacted

}

Section 3.2A, however, imposes and incorporates various restrictions. For one thing, { Redacted

}⁵ For another, { Redacted

} This provision also incorporates Section 3.3, which provides that { Redacted

} Thus, the operating

² Letter from J. Blair to A. Daly at 1 (Jan. 27, 2021).

³ Operating Agreement § 5.1.B.

⁴ *Id.* § 3.2A. (There is no Section 3.2, only Sections 3.2A and 3.2B.)

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* §§ 3.3, 3.8.

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agreement does not suggest that Amtrak should have a right to add the service proposed here, on the timetable Amtrak seeks and without Amtrak funding necessary infrastructure upgrades.

In any event, Amtrak soon changed course. After CSXT made clear its concerns clear about proceeding without finishing the HDR study, and explained that it was not in a position to provide access to Amtrak on the timeline requested, Amtrak could have invoked the operating agreement's arbitration provision:

{ Redacted

Redacted

} Amtrak abandoned that process and instead sought relief from the Board under § 24308(e) in March 2021. The parties have thus litigated this matter before the Board for over a year.

In turn, Amtrak has waived its right to invoke the operating agreement's arbitration process. "A party waives [its] right to arbitrate when [it] actively participates in a lawsuit or takes other action inconsistent with that right."⁹ Conduct inconsistent with the right to arbitrate includes participating actively in litigation, engaging on the merits, instigating discovery, and agreeing to set a case

⁸ *Id.* Art. VI.

⁹ *Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966).

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for trial.¹⁰ All of that has happened here. The Board should thus adjudicate Amtrak's application under § 24308, without regard to the contractual process.¹¹

B. Amtrak's initial letter was the only step taken under the operating agreement.

As part of this issue, the Board asked: "what, if any, steps have been taken by the Parties pursuant to the agreements?"¹² As noted above, Amtrak's initial correspondence invoked the operating agreement by proposing payment under Section 5.1.B (and thus requesting service under Section 3.2A). Since then, however, the parties have taken no other steps under the agreement.

C. No more steps under the agreement are contemplated.

The Board also asked: "Are any additional steps contemplated to be taken by any of the Parties pursuant to these agreements?"¹³ CSX currently contemplates no other steps under the operating agreement in relation to this dispute.

II. Section 5.1.E of CSXT's agreement with Amtrak does not apply to Amtrak's application in this proceeding.

The Board's second question asked: "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

¹⁰ *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774–75 (D.C. Cir. 1987).

¹¹ See CSXT and NSR's Rebuttal Evidence at 54 (explaining that "Amtrak cannot pick and choose forums that way. Amtrak chose to bring this dispute to the Board—not through arbitration.").

¹² March 14 Decision at 2.

¹³ *Id.*

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with NSR apply to Amtrak's application in this proceeding?"¹⁴ The answer is no. Section 5.1.E contemplates a specific process to redetermine the payments (or payment methodology) for service provided under the agreement. The parties here have not invoked that process, and this dispute concerns not only payment, but whether Amtrak has a right to add the service in the first place, a question beyond Section 5.1.E's scope.

{ Redacted

¹⁴ *Id.*

¹⁵ Operating Agreement § 5.1.E.

¹⁶ *Id.*

Redacted

}}

None of that has happened here. Neither party informed the other that it wanted to negotiate {{Redacted

}} Rather, Amtrak

proposed to add *additional* service, and suggested that payment would be governed by the existing process set forth in Section 5.1.B. The parties also have not

{{Redacted

}}. And there has

been no joint application under § 24308(a); Amtrak filed a unilateral application under § 24308(e). Section 5.1.E thus does not apply here.

III. If the Board found no unreasonable impairment and ordered additional trains, it could also require the construction of additional infrastructure under § 24308(a).

The Board's third question asked: "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,' 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)?"¹⁷ The answer is yes: The Board could order the construction of additional infrastructure if necessary to ensure reasonable terms and compensation

¹⁷ *Id.*

¹⁸ March 14 Decision at 2 (citation omitted).

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for Amtrak's access. That power does not depend on whether additional trains would unreasonably impair freight transportation.

Subsection 24308(a) empowers the Board to “prescribe reasonable terms and compensation for using the facilities and providing the services” that a carrier makes available to Amtrak.¹⁹ This language permits the Board to order the construction of infrastructure in two ways.

First, standing alone, “reasonable . . . compensation” can 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*.”²⁰ Thus, if building additional infrastructure is necessary to reasonably compensate freight carriers for additional Amtrak trains, the Board has the power to order Amtrak to undertake or pay for such construction.

Second, in any event, this provision is not limited to “compensation”; it also refers to “reasonable terms.” Courts have read the phrase “reasonable terms” to give a federal agency “broad conditioning power.”²¹ The Board can thus “prescribe”

¹⁹ 49 U.S.C. § 24308(a)(2)(A)(ii).

²⁰ See *Regents of Univ. of Cal. v. Public Empl. Rel. Bd.*, 485 U.S. 589, 599 (1988) (noting that railroads providing services for each other could be “compensation”); see also *id.* at 602 (discussing a federal regulation stating that “compensation” can include “non-monetary valuable consideration”).

²¹ See *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.

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the construction of necessary infrastructure as a “reasonable term[]” for Amtrak to “us[e] the facilities” at issue.²²

This power is not limited to situations where additional Amtrak trains would “impair unreasonably freight transportation,” even if the case is brought under subsection 24308(e). Rather, subsection (e) 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).”²³ Thus, if the Board enters an “order under this subsection” “for additional trains”—whatever it concludes under the factors set forth in paragraph (e)(2)—it “shall” apply subsection (a), which confers the powers just explained.

This power also is not limited to any specific time horizon. “Reasonable” is a broad and flexible term, and thus allows the Board to order infrastructure necessary to compensate the railroads and facilitate Amtrak’s new trains both today and in the future, given the projected growth of freight service.

As a result, if the Board determined that CSXT and NSR failed to demonstrate unreasonable impairment and ordered them to provide or allow for the operation of additional trains, the Board could also require the construction of additional infrastructure, as a reasonable term of or compensation for Amtrak’s use of the facilities.

1977) (similar).

²² 49 U.S.C. § 24308(a)(2)(A)(ii).

²³ *Id.* § 24308(e)(3).

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IV. If the Board found that Amtrak service would cause unreasonable impairment without additional infrastructure, it could order the service, subject to the prior construction of additional infrastructure.

The Board's fourth question asked: "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?"²⁴ The answer is yes: The Board could order the additional Amtrak service on the condition that Amtrak first fund the construction of the necessary infrastructure.

Congress passed subsection (e) to ensure that additional Amtrak service "may be added where no significant impairment of freight operations is demonstrated."²⁵ The corollary is that Congress did not intend additional Amtrak service to be added if it will unreasonably impair freight-rail operations. Thus, if the Board finds unreasonable impairment here, it should either (a) deny Amtrak's application outright, or (b) order sufficient measures—to be completed at Amtrak's expense, and before Amtrak service begins—to avoid the impairment.

²⁴ March 14 Decision at 2.

²⁵ H.R. Conf. Rep. 96-1041, at 42–43, 1980 U.S.C.C.A.N. 1183, 1203.

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As CSXT and NSR have explained, the Board has the power to impose preconditions on Amtrak's access. Indeed, the Supreme Court has held that the agency has such authority under the Rail Passenger Service Act, rejecting the "restrictive" "notion that, in assessing impairment, the [agency] may consider only the [Amtrak] conveyance itself, not any mitigating measures."²⁶ And § 24308's text confirms this power in two places.

First, subsection (a) allows the Board to "prescribe reasonable terms and compensation" for Amtrak access.²⁷ As explained above, that power includes the ability to order the construction of infrastructure. And it allows the Board to require construction before Amtrak service begins. When Amtrak will start "using the facilities" is a "term" of that use under subsection (a).²⁸ Thus, if the Board determines that Amtrak service will unreasonably impair freight operations, it can "prescribe" that Amtrak's access not begin until necessary infrastructure has been built to avoid the impairment.

Second, subsection (e) allows the Board to order a carrier "to provide or allow for the operation of the requested trains."²⁹ To "provide . . . for" commonly means to

²⁶ *Nat'l R.R. Psgr. Corp. v. Boston Maine Corp.*, 503 U.S. 407, 423 (1992); *see* CSXT and NSR's Rebuttal Evidence at 53–54.

²⁷ 49 U.S.C. § 24308(a)(2)(A)(ii).

²⁸ *See id.*

²⁹ 49 U.S.C. § 24308(e)(1).

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“take measures in preparation”³⁰ or “make provision or adequate preparation.”³¹ If the Board finds that Amtrak’s proposed service would unreasonably impair freight operations, then “adequate preparation” for that service would require constructing any infrastructure necessary to avoid such impairment, before the service begins.

The Board could thus order the carriers to undertake these preparations. Under paragraph (e)(3), if Amtrak did not agree to pay for this work, compensation would be determined under subsection (a). And “reasonable . . . compensation” under subsection (a) would necessarily require Amtrak to pay for any work needed to prevent the impairment that its service would otherwise create.

The statutory history confirms the Board’s power to order these measures before Amtrak service begins. The original bill that became subsection (e) gave the agency no discretion—it said the agency “shall” order the proposed additional trains upon Amtrak’s application, and did not mention impairment at all.³² But Congress rejected that approach, adding the hearing component and prescribing factors the agency must consider, including unreasonable impairment.³³ Congress thus concluded that the agency “should have discretion to take into account any serious adverse impacts on a railroad’s freight operations which may result from additional

³⁰ American Heritage Dictionary, *Provide* (2d. ed. 1983)

³¹ Oxford English Dictionary, *Provide* (2d ed. 1989); *see also* Black’s Law Dictionary, *Provide* (5th ed. 1979) (“To make, procure, or furnish for future use, prepare”); Webster’s New World Dictionary, *Provide* (2d ed. 1982) (“to prepare (for or against) a possible situation, event, etc.”).

³² H.R. 6837, § 112, Report No. 96-839 (Mar. 20, 1980).

³³ *See* H.R. Conf. Rep. 96-1041, at 42, 1980 U.S.C.C.A.N. at 1203.

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service.”³⁴ The only sensible reading of these changes—and thus, of the final statute—is that the agency can and must impose appropriate conditions necessary to avoid unreasonable impairment that additional trains would otherwise cause.³⁵

Congress’s decision to expand the agency’s discretion also confirms that subsection (e)’s 60-day time limit merely imposes a deadline for the Board to rule after a hearing, and thus does not limit the Board’s conditioning power.³⁶ This is clear from the statutory context: This clause is one of three time limits in § 24308, and the other two both refer to the time for the Board to act. Subparagraph (a)(2)(C) says the “Board shall decide the dispute not later than 90 days after Amtrak submits the dispute,” and the very next sentence in subsection (e) gives the Board 30 days after receiving an Amtrak application to publish an explanation for not holding a hearing.³⁷ Read in this context, paragraph (e)(1)’s 60-day limit naturally refers to the time for the Board to act after the hearing. And the history described above bolsters this reading: It would make no sense for Congress to give the agency broad discretion, including to consider unreasonable impairment, and at the same time restrict the agency’s discretion by requiring that Amtrak service

³⁴ *Id.* at 42–43.

³⁵ CSXT continues to believe that any Board-ordered infrastructure projects would be a major federal action within the scope of the National Environmental Policy Act. *See* CSXT/NSR Motion to Dismiss at 5.

³⁶ *See* 49 U.S.C. § 24308(e)(1) (“After a hearing on the record, the Board may order the carrier, *within 60 days*, to provide or allow for the operation of the requested trains” (emphasis added)).

³⁷ *Id.* § 24308(a)(2)(C), (e)(1).

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begin within 60 days of the hearing in every case. That reading would deprive the Board of much of the flexibility that the statute confers.

Finally, even if the Board had no conditioning power—contrary to everything just explained—that would not mean Amtrak would have a right to start service that the railroads have shown will unreasonably impair their operations. Rather, absent a conditioning power, the proper result would be for the Board to deny Amtrak’s application. In doing so, the Board could articulate the conditions on which it would be prepared to approve a revised application, and Amtrak could then decide whether to agree to those conditions. But in no case can the Board simply order access that has been shown to cause unreasonable impairment.

V. If the Board ordered additional trains and additional infrastructure, it could not allocate the costs of any infrastructure to CSXT or NSR.

The Board’s final question asked: “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?”³⁸ The answer is no: Amtrak must bear the cost of any additional infrastructure, whether or not the Board finds unreasonable impairment. CSXT would not build any of the infrastructure at issue *but for* Amtrak’s access. Thus, only infrastructure necessary to accommodate Amtrak and compensate CSXT—which Amtrak must pay for—is appropriate.

³⁸ March 14 Decision at 2.

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As explained above, the Board may order the construction of additional infrastructure as a reasonable term or compensation for Amtrak's access, or as necessary to "provide . . . for" additional Amtrak service. That is, 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 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.

There is no basis for the Board to order new infrastructure that goes beyond what is necessary to accomplish these purposes, and thus to impose construction costs on the freight carriers. In adopting subsection (e), Congress wanted to avoid "*inordinate* capital improvements"—meaning improvements that exceed what is needed to put the freight carriers in the same position they would occupy absent Amtrak's "additional service."³⁹ Congress wanted to ensure that Amtrak would not have pay for such "inordinate" improvements,⁴⁰ but it follows equally that the Board has no warrant to order the freight railroads to build infrastructure, on their own dime, that is unnecessary to accommodate Amtrak. Such an order would amount to the Board commanding the freight carriers to upgrade their own facilities to improve their own operations—a directive with no basis in § 24308's text, structure, or purpose. That command would not be a "reasonable term," it certainly would not

³⁹ See H.R. Conf. Rep. 96-1041, at 42–43, 1980 U.S.C.C.A.N. at 1203.

⁴⁰ See *id.*

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be “compensation,” and it would not be needed to “provide . . . for” additional Amtrak service.⁴¹

In turn, the Board lacks authority to “determine which party bears the cost of constructing which infrastructure projects or otherwise apportion the costs of additional infrastructure” in part to the freight carriers. 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 for.

CONCLUSION

CSXT stands ready to address these and any other relevant questions at the evidentiary hearing.

⁴¹ See 49 U.S.C. § 24308(a)(2)(A)(ii), (e)(1).

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Respectfully submitted,

/s/ Raymond A. Atkins

Raymond A. Atkins

Matthew J. Warren

Tobias S. Loss-Eaton

SIDLEY AUSTIN LLP

1501 K Street, NW

Washington, DC 20005

(202) 736-8000

ratkins@sidley.com

mjwarren@sidley.com

tlosseaton@sidley.com

Counsel for CSX Transportation, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2022, a copy of the foregoing Pre-Hearing Brief Addressing The Issues Raised In the Board's March 11 Order 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