304250

ENTERED
Office of Proceedings
April 6, 2022
Part of
Public Record

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

MEMORANDUM ON PROPER SCOPE OF ANY WITNESS EXAMINATION IN AN ON THE RECORD HEARING

Pursuant to the colloquy with the Surface Transportation Board ("Board") during the evidentiary hearing on the morning of April 5, 2022, CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR") respectfully file this memorandum to supplement the record regarding their objection[1] to the tenor and form of the Board's cross-examination of witness Charlie Banks on April 4 and April 5, 2022, and to expand on the principles providing parameters regarding the judicial role during a hearing on the record. CSXT and NSR appreciate that the Board

[1] Counsel for Amtrak "t[ook] issue with the timing of this objection being raised today as opposed to when the Chair began questioning yesterday of the witnesses." Evidentiary Hearing Day 2, STB Docket No. FD 36496 (posted to YouTube Apr. 5, 2022), at 1:19:17–19:32. CSXT and NSR timely objected under Federal Rule of Evidence 614, which permits objections to a court's examination "at that time or at the next opportunity when the jury is not present." FED. R. EVID. 614(c). Not only did counsel for CSXT and NSR object during the ongoing testimony of Charlie Banks, counsel endeavored to do so in a delicate manner prior to recommencement of testimony. *See United States v. Evans*, 994 F.2d 317, 322–23 (7th Cir. 1993) (holding that a Rule 614(c) objection was preserved for appeal when defense counsel moved for mistrial first thing the following day). Moreover, CSXT and NSR's objection was "made in apt time to afford the opportunity to take possible corrective measures." FED. R. EVID. 614, Advisory Committee Notes to the 1972 Proposed Rules, Notes to Subdivision (c).

appears to have taken many of these principles into consideration during the testimony of Ricky Johnson, in which the Board's questioning was generally directed toward clarification of the testimony being presented.

Although CSXT and NSR recognize that this is an agency proceeding, they note that the Board's decision to invoke its authority to conduct a "hearing on the record" triggers a formal adjudicative proceeding that is directly analogous to a trial. *See 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.' Formal proceedings do not attach to a requirement of a 'hearing;' such proceedings would obtain only on the requirement of a 'hearing on the record.'"). Accordingly, the Board must conduct this proceeding differently from its many other proceedings such as merger, abandonment, or rate proceedings—a point that dovetails with the Board's prior representation that it intended to conduct the hearing in accordance with the Federal Rules of Evidence.[2] For these reasons, CSXT and NSR respectfully submit that the parameters of fair play regarding the role of neutral arbiter in other evidentiary settings provide an appropriate standard by which to measure the extent to which Board members may directly examine the parties' witnesses.

---

[2] *See* Decision at 1, *Application of Nat'l Passenger R.R. Corp. Under 49 U.S.C. § 24309(e)—CSX Transp., Inc., & Norfolk S. Ry. Co.*, Docket No. FD 36496 (STB served Feb. 8, 2022) ("For the evidentiary hearing, the Board's rules of evidence at 49 C.F.R. part 1114 subpart A will apply, and the Federal Rules of Evidence may be consulted for guidance, where appropriate.").

I. A Trial Court Is Not Permitted to Perform the Function of an Advocate at Trial.

Although judges may question a witness for the purpose of clarifying testimony, that principle has limits. When an arbiter crosses the line from clarification to acting as an advocate or witness, the fairness of the proceeding has been compromised. *See* Wright and Miller, § 2412 Practice Under Original Rule 43—Examination and Cross-Examination, 9A Fed. Prac. & Proc. Civ. § 2412 (3d ed. 2021) (explaining that a trial court is "not permitted to appear to be an advocate or a prosecutor . . . and if its questioning was too partisan or *too extensive* it could constitute reversible error" (emphasis added)). Stated another way, judges are not permitted to "usurp the functions . . . of the representatives of the parties," *United States v. Pellegrino*, 470 F.2d 1205, 1207 (2d Cir. 1972), or to "take the course of the trial out of the hands of competent attorneys." *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir. 1960). While this principle certainly applies in the jury trial context, *see Groce v. Seder*, 267 F.2d 352, 355 (3d Cir. 1959) ("Where both sides are represented by eminently competent counsel we think it important that the court minimize its own questioning of witnesses, to the end that any such judicial departure from the normal course of trial be merely helpful in clarifying the testimony rather than prejudicial in tending to impose upon the jury what the judge seems to think about the evidence."), its function is to preserve the truth-finding role of the adversary process, an indispensable aspect of evidentiary proceedings whether the case is tried to a judge *or* a jury. *Compare id.* with *Crandell v. United States*, 703 F.2d 74, 78 (4th Cir. 1983) (taking issue with court's hostile questioning of expert witness, including

"contort[ion] of testimony," and noting that "[a]lthough the issues were tried to the judge alone, the possible inhibitive effect on witnesses and counsel presented as much a danger as it would have in a jury trial.").

CSXT and NSR are concerned that the Board's line of questioning from timestamp 6:14:53 to 7:08:09 on the publicly available recording of first day of the evidentiary hearing crossed the line from clarification into advocacy on a number of occasions. Much of the Board's questioning had the tenor and features of a cross-examination. The Board almost exclusively used leading questions that called for "yes" or "no" answers. *See*, *e.g.*, Evidentiary Hearing Day 1, STB Docket No. FD 36496 (posted to YouTube Apr. 4, 2022), at 6:22:22–22:36 ("But it is true that the 14 projects that were selected, were selected so that the model would produce a 95-percent on-time performance; that is correct, is it not?").[3] The Board repeatedly used those questions not only to elicit facts, but also to challenge the credibility of the witness. *See, e.g.*, *id.* at 6:23:36–23:42 ("So that—that's a true statement, you stand behind it; you said nothing would be in here that you didn't agree with?"); *id.* at 6:29:15–29:38 ("So all we have to go on is your statement that this is the combined wisdom of three people who have been brought forward in this case, on your side of the case; there's nothing else we can look to, to determine whether achieving a 95 percent in the RTC model is the right number?"); *id.* at 6:32:47–33:24 ("And I am looking at the language, which you said you opined, that says the project selection must meet; you don't say

[3] In the absence of an official transcript from the Board's court reporter, CSXT and NSR have endeavored to accurately transcribe the recordings on YouTube.

approximately to meet, or may meet, or it would be helpful to meet; you say it must meet a level to restore freight traffic performance to at least—it was not the same, not approximately the same or close to the same—at least the same as before passenger trains. Now you're telling me that that's an unfortunate way to express it and I shouldn't rely on it; is that where we are?"). Lastly, the Board's examination was extensive, subjecting the witness to leading questions and attacks on credibility for approximately 53 minutes uninterrupted on the first day of the hearing. On the second day of the hearing, the Board's examination continued for approximately 40 minutes and, after redirect by counsel for CSXT, the Board re-examined Mr. Banks for an additional 13 minutes on the same material that was subject of the Board's two prior examinations. The Board's examination far exceeded the approximately 45 minutes of cross examination by counsel for Amtrak, at least 10 minutes of which was consumed by technological issues associated with the discussion of highly confidential information in a break-out room.

As one court put it, the "overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it." *People v. Arnold*, 98 N.Y.2d 63, 67 (N.Y. 2002). Judged by that standard, all of the above-listed features of the Board's questioning—considered together—overstepped the line between arbiter and advocate. *See United States v. Cassiagnol*, 420 F.2d 868, 878 (4th Cir. 1970) (concluding in reviewing a bench trial that "exhaustive interrogat[ion]," which "in one instance cover[ed] thirteen consecutive pages of trial transcript (with the exception of defense counsel's attempt to ask his client one

question which was cut off by the judge)" was inappropriate); 1 McCormick On Evid. § 8 (8th ed.) ("Leading judicial questions clearly aimed at discrediting or impeaching the witness, though allowable for counsel, can intimate the judge's belief that the witness has lied, and hence constitute a verboten implied comment."); *Crandell*, 703 F.2d at 78 (taking issue with court's hostile questioning of expert witness in bench trial, and noting "the possible inhibitive effect on witnesses and counsel" that such conduct may have).[4]

II. A Trial Court Must Conduct Proceedings in a Manner that Preserves the Appearance of Impartiality.

Relatedly, a trial court's questioning must be conducted so as to preserve both the reality and appearance of impartiality. *See Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir. 1972) ("It is important that the litigant not only actually receive justice, but that he believe that he has received justice."). Both reality and appearance are risked

[4] The Board cited two cases during the colloquy of April 5, 2022. Neither changes the analysis reflected in this memorandum. One case, *Roach v. National Transportation Safety Board*, merely provides that an "ALJ has the right to interrogate witnesses" in order to "conduct the hearing in an orderly manner and to elicit the truth." 804 F.2d 1147, 1160 (10th Cir. 1986). But, as noted above, CSXT and NSR acknowledge that the arbiter has the power to ask questions. The issue concerns the consequences of overstepping the limits on that power. The second case, *Jackson v. United States*, was cited for the proposition that the questioning identified in this memorandum was unproblematic because there is no jury in this proceeding. *See* 329 F.2d 893, 894 (D.C. Cir 1964) (noting that "in a nonjury case, as in an appellate court, needless or active interrogation by judges, although not always helpful, is rarely prejudicial"). But "rarely" does not mean "never," and CSXT and NS have made a point of citing principles that would apply equally in bench and jury trials—as well as cases applying them in both contexts. *See, e.g.*, *Crandell*, 703 F.2d at 78. Moreover, *Jackson* itself acknowledges the "obvious general rule" that "the interrogation of witnesses is ordinarily best left to counsel, who presumably have an intimate familiarity with the case." *Id.*; *see also id.* (noting that "the judge is something more than a moderator, *but always a neutral umpire*") (emphasis added).

where judges engage in sustained cross-examination, including leading questions calculated to discredit or impeach or that indicate prejudgment of the issues. *See Texas Pac.-Missouri Pac. Terminal R. of New Orleans v. Welsh*, 179 F.2d 880, 881 (5th Cir. 1950) ("As a general rule a trial Judge, in order to maintain that impartiality which proper trial technique demands, should be careful not only as to the number and type of questions propounded by him to witnesses but also as to the manner in which they are propounded."); 1 McCormick On Evid. § 8 (8th ed.) (noting that "[e]specially since the judge is an authority figure, there is a grave risk that the witness will adopt any suggestion implicit in the judge's question. Some witnesses are more likely to adopt the suggestion in a judge's question than in a question posed by counsel," and that "[l]eading judicial questions clearly aimed at discrediting or impeaching the witness, though allowable for counsel, can intimate the judge's belief that the witness has lied, and hence constitute a verboten implied comment."). The Board's questioning, as reviewed above, is also problematic for this independent reason.

Moreover, these concerns can only be heightened when the arbiter's questioning includes statements disparaging the evidence and injecting considerations that are irrelevant to the legal or factual disputes before the tribunal. The questioning at issue included both. In a statement—not a question—offered partway through the testimony of one witness on the first day of the evidentiary hearing, the Board openly commented on the *projected* unreliability of the evidence

underlying a party's case.[5] Such comments suggest that the arbiter has prejudged the case—that he or she has formed a view of the persuasiveness of evidence in advance of its presentation. *See Cassiagnol*, 420 F.2d at 878 (noting that questioning at bench trial during which "[t]he judge lectured and chided" the witness prior to completion of the defendant's case demonstrated "that the trial judge had prejudged the case before hearing all the evidence" and granting a new trial).

III. A Trial Court May Not Draw Facts From Materials Not in Evidence.

Finally, a tribunal conducting a hearing on the record may not rely upon alleged "facts" contained in materials that are not in evidence. The rules of evidence provide that courts may take judicial notice of facts that (1) are generally known in the court's territorial jurisdiction, or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Press reports do not fall into that category. *See Petrobras Am., Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9. F.4th 247, 255 (5th Cir. 2021) (concluding that "newspaper articles . . . were not proper material for judicial notice" because "[i]t was not established that the accuracy of the articles could not be reasonably questioned, nor that the facts were 'generally known within the' district court's jurisdiction").

---

[5] Evidentiary Hearing Day 1, at 6:33:30–34:10 ("Well, you know, when you say that, Mr. Banks, it causes me to wonder, do I have to go through every line of this report and find out which of the wording is something that could have been stated better, because this is all I have. So I'll just—I'll just leave my observation there on this point. But, you know, when you say something is a gold standard, and then you start having to say that the gold standard has defects in the way something is presented, I wonder if it is the gold standard and how we are supposed to have a record on which we can rely on . . . .").

The Board's questioning explicitly relied upon press reports that were not in evidence, not produced, and not provided to the parties in advance for inspection, objection, explanation, or rebuttal.[6] That reliance was error. *Interstate Com. Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913) (noting that the ICC was not permitted to "act upon their own information"—lawfully gathered under § 12 of the Interstate Commerce Act—to find certain class and commodity rates unreasonable "where the party is entitled to a hearing" because "[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal"); *see Brown v. City of Pittsburgh*, 586 F.3d 263, 291 (3d Cir. 2009) (noting that even in a preliminary injunction hearing where "evidentiary rules [were] relaxed," reliance on facts in press reports and statistics on websites was reversible error where parties had no notice that the Court was relying on such evidence and no opportunity to rebut, place into context, or object to it).

CONCLUSION

For these reasons, CSXT and NSR renew their objections raised on the record on Tuesday as concerns the tenor and form of certain Board questioning. CSXT and NSR respectfully submit this Memorandum for the Board's consideration as the

[6] Evidentiary Hearing Day 1, at 6:40:53–41:27 ("Q: The—were you aware that in 2021, according to news reports, CSX estimated the infrastructure that would be needed was only 140 to $160 million? A: I was not aware of that. Q: Well, it was in the press; so I don't know if they did or didn't. We'll find out, I suppose, before this hearing is over.").

evidentiary hearing continues, and respectfully request that the Board refrain from similar questioning in the future.

Respectfully submitted,

/s/ William A. Mullins
William A. Mullins
Crystal M. Zorbaugh
BAKER & 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

/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.

Dated: April 6, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2022, a copy of the foregoing Memorandum on Proper Scope of Any Witness Examination in an On The Record Hearing 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