

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

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

AMTRAK'S RESPONSE TO CSX'S AND NS'S MOTION IN LIMINE

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TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT2

I. THE SLIDES CAN BE USED AS DEMONSTRATIVES UNDER THE BOARD’S
RULES OF EVIDENCE.2

II. THE PARTIES HAVE RESERVED THE RIGHT—AND CSX AND NS HAVE
EXERCISED THAT RIGHT—TO RESPOND TO THE OTHER PARTIES’
ARGUMENTS IN GREATER DETAIL DURING THE EVIDENTIARY HEARING.....4

III. THE CHALLENGED SLIDES IN AMTRAK EXHIBIT 6 ARE NOT “NEW
ANALYSIS” AND CONTAIN NO “UNFAIR SURPRISE.”6

CONCLUSION.....8

INTRODUCTION

On April 1, 2022, CSX Transportation, Inc. (“CSX”) and Norfolk Southern Railway Company (“NS”) filed a motion *in limine* (the “Motion”) to preclude the National Railroad Passenger Corp. (“Amtrak”) “from including evidence and arguments relating to expert analysis that was not previously disclosed in expert reports or verified statements filed by Amtrak” as “unfair surprise evidence.”¹ Specifically, CSX and NS objected to the inclusion of “slides 33 through 47 of Amtrak Exhibit_6” because they allegedly “consist of new analysis concerning the theoretical capacity of [NS]’s portion of the Gulf Coast Corridor and the necessity of the crossover projects in New Orleans set forth in the 2021 Gulf Coast RTC Report.”² They also objected to the inclusion of “slides 48 through 59 of Amtrak Exhibit_6” because they allegedly “consist of unsourced and never-before-presented analysis of Gulf Coast Corridor trends and specific train movements.”³

Although the Board stated that it would reserve ruling on the Motion until Amtrak attempted to use the demonstrative exhibit with its witness, Amtrak is providing this written response to the Motion within the time otherwise allowed by the Board’s rules given that the Motion was filed on April 1 and thus a written response is due on April 21. Amtrak respectfully requests the opportunity to present oral argument on the Motion when the slides and accompanying testimony at issue are proffered at the evidentiary hearing.

Contrary to CSX’s and NS’s claim, the challenged slides do not contain new analysis. Instead, they are either enlarged or more detailed versions of graphs and statements already in

¹ Motion at 1–2.

² *Id.* at 2. The challenged slides are attached hereto as “Exhibit A.” Because CSX and NS designated the workpapers upon which these slides are based as either “confidential” or “highly confidential,” Amtrak was forced to designate Amtrak’s slides as such also.

³ *Id.*

Amtrak's written evidence, or visualization of facts taken directly from CSX's and NS's productions in this matter. These demonstrative exhibits as well as any potential accompanying testimony are admissible under the rules of evidence that govern the Board's hearings. In addition, all parties explicitly reserved their right to address arguments in the other parties' pre-hearing briefs through live testimony and demonstratives—even if they were not specifically included in the pre-hearing briefs—and CSX and NS have liberally exercised that right throughout this evidentiary hearing. Depriving Amtrak's opportunity to do the same is unfair as well as unhelpful to establish a comprehensive record of facts to support the Board's decision on the merits. Moreover, given that by the time the slides are proffered, CSX and NS will have had the slides in their possession for more than seven weeks and thus will have had ample time to prepare cross-examination about them, there can be no claim of unfair surprise or prejudice.

ARGUMENT

I. THE SLIDES CAN BE USED AS DEMONSTRATIVES UNDER THE BOARD'S RULES OF EVIDENCE.

Under the rules that govern this evidentiary hearing, the Board generally should allow the parties to present demonstrative exhibits in aid of their cases. Chapter X of the Code of Federal Regulations Title 49 governs Board hearings. Section 1100.3 requires that “[t]he rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”⁴ Similarly, Section 1114.1, the rule of admissibility, allows “[a]ny evidence which is sufficiently reliable and probative” under the admissibility standards of the Administrative Procedure Act, the federal statutes in general, or a bench trial to be admissible “in hearings before the Board.”⁵ It also makes clear that “[t]he rules of evidence will be applied in any proceeding to the end that necessary

⁴ 49 C.F.R. § 1100.3.

⁵ 49 C.F.R. § 1114.1.

and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.”⁶ Consistent with this, the Board has ruled in the past that “[t]he Board’s rules of practice are more informal than the Federal Rules of Evidence; they permit the Board to accept any evidence that is reliable and probative (49 C.F.R. § 1114.1) and are to be construed liberally (49 C.F.R. § 1100.3).”⁷ The Board’s oral rulings on evidentiary objections during the hearing also demonstrates the same spirit of prioritizing merits over technicalities. As Chairman Oberman explained: “I want facts in the record that will sustain any decision we [the Board] reach.”⁸

Here, as demonstrated in more detail below, the slides about which CSX and NS have complained in the Motion fall into two categories: *First*, slides 34 through 41 in Amtrak Exhibit 6 are simply enlarged or more detailed versions of graphs and statements that already appear in the Reply Verified Statement of Clayton S. Johanson, Michael Weaver, and Darkhan Mussanov (the “DB Reply Verified Statement”); *Second*, slides 33, and 42 through 59 in Amtrak Exhibit 6 are demonstratives that simply fact-check and rebut some of the factual claims in CSX’s and NS’s briefs, including claims in their rebuttal brief and response brief to Amtrak’s surrebuttal, and are based entirely on data *produced by CSX and NS* in this matter. Neither category contains any “new analysis,” let alone “unfair surprise.”⁹ The Board should deny the Motion, in light of the governing liberal rules of evidence in Title 49 of the Code of Federal Regulations, the Board’s past rulings, as well as the Board’s oral rulings during the evidentiary hearing in this matter.

⁶ *Id.*

⁷ *Denver & Rio Grande Ry. Hist. Foundation – Petition for Declaratory Ord.*, FD 35496, slip op. at 3–4 (S.T.B. served Aug. 18, 2014) (denying motion to strike photographs depicting rail line or equipment).

⁸ April 5, 2022 AM Hr’g Rough Tr. 27:8–10.

⁹ The federal rules and cases cited in the Motion are not binding on the Board, and are also irrelevant here because they address undisclosed new analysis by expert witnesses that pose unfair surprise to the opposing party.

II. THE PARTIES HAVE RESERVED THE RIGHT—AND CSX AND NS HAVE EXERCISED THAT RIGHT—TO RESPOND TO THE OTHER PARTIES’ ARGUMENTS IN GREATER DETAIL DURING THE EVIDENTIARY HEARING.

Recognizing the pre-hearing briefs had their limitations that could be better addressed in an evidentiary hearing, in their last round of briefing, CSX, NS, and Amtrak all explicitly reserved their right to respond to the other parties’ arguments and evidence more comprehensively through the evidentiary hearing. Amtrak wrote in its surrebuttal that “Amtrak looks forward to addressing all of CSX’s and NS’s arguments more comprehensively in the evidentiary hearing”¹⁰ Similarly, CSX and NS wrote in their response to Amtrak’s surrebuttal that “[CSX] and [NS] reserve the right to supplement this Response to Amtrak’s Surrebuttal through the presentation of witness testimony, cross-examination, and exhibits at the evidentiary hearing”¹¹

Of course, that right to supplement has its limits. Accordingly, when CSX and NS recently revealed that their witness, Mark Dingler, apparently had performed new Rail Traffic Controller (“RTC”) modeling in the middle of the evidentiary hearing and was prepared to present that new analysis to the Board, Amtrak objected. Thereafter, CSX, NS, the Port, and Amtrak entered into a joint stipulation that “[a]bsent contrary instructions from the Board, a party may not through its expert witnesses present testimony about analyses that were not previously disclosed in the parties’ written evidence.”¹² As Amtrak made clear to all parties when entering into that stipulation, however, this stipulation does not prohibit the parties from presenting known facts through testimony or from offering demonstrative exhibits to visually depict rebuttals to other parties’

¹⁰ Joint Exhibit 49 at 4.

¹¹ Joint Exhibit 61 at 15.

¹² April 14, 2022 Hr’g Rough Tr. 2:13–17.

factual claims, especially in light of the Board’s instruction to have “facts in the record that will sustain any decision [the Board] reach[es].”¹³

In fact, CSX’s and NS’s witnesses have already done just that—providing testimony and using demonstrative exhibits that were never disclosed in the parties’ written evidence. For example, during Hannah Rosse’s and Holly Sinkkanen’s direct examinations, counsel for CSX and NS repeatedly used as a demonstrative exhibit CSXNS Exhibit 150. This was a PowerPoint entitled “Trains that Will Not Show in Data” and first disclosed to Amtrak on March 28, 2022 (the same date Amtrak’s challenged slides were disclosed to CSX and NS). Both Ms. Rosse and Ms. Sinkkanen provided extensive testimony about this exhibit.¹⁴ Counsel claimed that it was merely a “visual” for a chart on pages 18 and 19 of CSX and NS’s rebuttal RTC report.¹⁵ But it contains much more detail and information than the chart in CSX and NS’s rebuttal report—as Ms. Rosse admitted during her direct examination: “[I]t’s a demonstrative that I put together breaking down the high level categories of trains and movements that are not captured in the data.”¹⁶

As demonstrated below, the challenged demonstratives submitted by Amtrak here and the potential accompanying testimony is no different from the new demonstratives and testimony that CSX and NS have proffered during the hearing. Prohibiting Amtrak from presenting its demonstratives while allowing CSX and NS to do so is unfair and also unhelpful to establish a comprehensive record of facts to support the Board’s decision on the merits.

¹³ April 5, 2022 AM Hr’g Rough Tr. 27:8–9.

¹⁴ April 8, 2022 Hr’g Rough Tr. 58:16–81:21, 248:10–251:15.

¹⁵ *Id.* at 76:3–14.

¹⁶ *Id.* at 59:3–8.

III. THE CHALLENGED SLIDES IN AMTRAK EXHIBIT 6 ARE NOT “NEW ANALYSIS” AND CONTAIN NO “UNFAIR SURPRISE.”

The demonstratives challenged by CSX and NS in the Motion are slides 33 through 59 in Amtrak Exhibit 6 (attached hereto as “Exhibit A”). They fall into two categories. The first category (slides 34 through 41) contains enlarged or more detailed demonstratives of illustrations or statements in the DB Reply Verified Statement. Specifically, slide 34 is a demonstrative showing that a proposed Ocean Springs siding can add “16 additional capacity units” along the Gulf Coast Corridor—a statement on page 23 of the DB Reply Verified Statement.¹⁷ Similarly, slides 35 through 41 are enlarged and more detailed versions of the illustrations regarding proposed new infrastructures at the Back Belt that are already in DB’s final report attached to its Reply Verified Statement.¹⁸ There is no “new analysis” or “unfair surprise” in these slides.

The second category (slides 33, and 42 through 59) contains visual depictions of facts and data in the productions CSX and NS made to Amtrak in this matter and serves to fact-check and rebut the factual claims in CSX’s and NS’s pre-hearing briefs, including their rebuttal brief and response brief to Amtrak’s surrebuttal. Specifically, CSX and NS claimed in their rebuttal that Amtrak did not account for the fact that Amtrak’s proposed passenger trains supposedly will run during “peak hours” of freight train operations.¹⁹ Slide 33 is a demonstrative prepared by DB that simply takes a spreadsheet produced by CSX²⁰ of its freight train departure times and visually depicts those times to show when the Amtrak trains will run as compared to what CSX’s own data shows about when its freight trains are running.

¹⁷ Joint Exhibit 32ZA at 22–23.

¹⁸ Joint Exhibit 32ZB at 34.

¹⁹ Joint Exhibit 41 at 22, 49.

²⁰ CSX_AmtrakGC_0034413.

Slide 42 is simply a quotation from CSX's and NS's opening evidence regarding how much time in a day CSX and NS trains supposedly would need to wait for Amtrak trains to pass at the Back Belt. In their rebuttal, CSX and NS criticized DB for "assum[ing] there is unlimited holding capacity at these terminals in which freight trains can wait patiently until they move into their assigned slots."²¹ In order to fact-check these claims, DB prepared slides 43 through 46, which again simply visually depict the train movement files that were produced by NS in this matter.²² This is just a visualization of NS's own data about the existing operating windows for freight trains and Amtrak *Crescent* trains at the Back Belt.

Similarly, slides 47 through 52 are graphs visualizing the trends of length, weight, and train count of freight trains since 2015, taken from the train profile spreadsheets produced by CSX in this matter.²³ These slides and accompanying testimony serve to fact-check CSX and NS's criticism in their rebuttal and response to Amtrak's surrebuttal that Amtrak fails to consider the future impact of Amtrak trains on freight growth along the corridor.²⁴

Finally, slides 53 through 59 are graphs visualizing the significant delays already experienced by existing local freight trains, again taken from the freight train profiles produced by CSX in this matter.²⁵ In their rebuttal and response to Amtrak's surrebuttal, CSX and NS claimed that Amtrak's proposal will cause significant delays in particular to local freight services.²⁶ These slides and accompanying testimony will rebut the alleged impact on local freight train delays.

²¹ Joint Exhibit 41A at 23.

²² NSR-00032321 and NSR-00032322.

²³ CSX_AmtrakGC_0000003 and CSX_AmtrakGC_0000008.

²⁴ Joint Exhibit 41A at 2; Joint Exhibit 61 at 12.

²⁵ CSX_AmtrakGC_0000003 and CSX_AmtrakGC_0000008.

²⁶ Joint Exhibit 41 at 6; Joint Exhibit 61 at 2–3.

Visualization of facts and data taken directly from CSX's and NS's productions are not "new analysis." Fact-checking CSX's and NS's factual claims is hardly "unfair surprise." And in any event, given that CSX and NS still have almost three weeks (on top of the four weeks since these slides were provided to them) to prepare their cross-examination on these slides, any claim of "unfair[] prejudice"²⁷ is without merit.

CONCLUSION

For the above stated reasons, Amtrak respectfully requests the Board deny CSX's and NS's Motion.

April 21, 2022

Respectfully submitted:

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²⁷ Motion at 1.

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day served copies of this document upon all parties of record in this proceeding by email on the service list to Finance Docket No. 36496.

/s/ Jessica Ring Amunson
Jessica Ring Amunson

April 21, 2022

EXHIBIT A

AmtrakExhibit_6

(Highly Confidential)

DB Demonstratives

REDACTED