

**EXPEDITED CONSIDERATION REQUESTED**

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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
DOCKET NO. FD 36496

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ENTERED  
Office of Proceedings  
May 20, 2022  
Part of  
Public Record

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

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**AMTRAK'S RESPONSE TO RENEWED MOTION FROM CSX, NS, AND THE PORT  
FOR BOARD-SPONSORED MEDIATION**

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The National Passenger Railroad Corporation (“Amtrak”) respectfully offers this response to the renewed motion of CSX Transportation, Inc. (“CSX”), Norfolk Southern Railway Co. (“NS”), and the Alabama State Port Authority and Terminal Railway Alabama State Docks (“the Port”), for Board-sponsored mediation and for a stay of proceedings while mediation is ongoing, as well as for an extension of the proceedings. Because CSX and NS have made clear that they do not intend to share information with Amtrak as part of the mediation process, because a stay of proceedings would prolong a process that has already taken far too long, and because Amtrak continues to believe that having the Board’s guidance on the legal standards is critical, Amtrak opposes the renewed mediation request.

To be clear, Amtrak is not uniformly opposed to mediation. Counsel for CSX and NS initially contacted counsel for Amtrak on the afternoon of May 16, 2022, to provide their proposal for Board-sponsored mediation. The next morning, counsel for Amtrak responded that Amtrak was open to the possibility of mediation provided that: (1) CSX and NS agree to redesignate all materials associated with the 2020 and 2021 RTC studies from “Highly Confidential” to “Confidential,” or agree to some other arrangement that would allow Amtrak personnel to be able

to work with Amtrak’s outside consultants on RTC modeling; and (2) CSX and NS agree to provide Amtrak with information that would allow Amtrak to respond to the Board’s requests of May 12, 2022, including information that would allow Amtrak to compare the supposed “impairment” of Amtrak on freight transportation on the Gulf Coast line to any supposed “impairment” on other CSX and NS lines on which Amtrak runs, as well as information about customer service on the Gulf Coast line. Counsel for Amtrak also explained that Amtrak did not want any stay of proceedings while mediation was ongoing because these proceedings have already gone on for far longer than Congress ever envisioned when it enacted this statute to provide Amtrak with an expedited means to provide additional intercity passenger service. Counsel for Amtrak then immediately followed up on that phone call by providing CSX and NS with a specific list of the information Amtrak was seeking to be able to respond to the Board’s requests.<sup>1</sup> Receiving no communication at all from CSX or NS through May 17 or 18, counsel for Amtrak then contacted counsel for CSX and NS on the evening of May 18 to inquire as to the status of Amtrak’s requests. On the morning of May 19, 2022, counsel for CSX informed counsel for Amtrak that CSX and NS would not agree to Amtrak’s counterproposal, would not agree to redesignation or any other arrangement for Amtrak personnel to be able to access “Highly Confidential” RTC materials, and would proceed with filing their renewed motion for Board-sponsored mediation.

Given CSX’s and NS’s response to Amtrak’s requests, it is clear to Amtrak that CSX and NS have no intention of entering the mediation process in good faith and with a commitment to transparency. CSX and NS have been resolute in preventing Amtrak from having access to information that not only would allow Amtrak to respond to the Board’s requests, but also allow

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<sup>1</sup> Later that same day, Amtrak served supplemental interrogatories on CSX and NS seeking the same information.

Amtrak to assess the validity of CSX's and NS's demands for infrastructure to be paid for by taxpayer dollars. The careful wording of their mediation request confirms that CSX and NS do not intend to allow Amtrak access to any of this information in mediation. *See* Mot. at 3 (suggesting that only the mediator would have access to information); *id.* at 4 (proposing that only "the parties' respective experts" and not any Amtrak personnel would be permitted to engage in a technical conference with Board staff on the RTC modeling).<sup>2</sup> This request for mediation along with a 60-day stay of proceedings appears to be simply another effort to delay resolution of an issue that has already encountered far too much delay.

Accordingly, Amtrak urges the Board to deny the renewed motion for mediation, including the request for a technical conference. However, even if the Board orders mediation, it should not stay the proceedings. Although it is true that the Board's regulations provide the Board with authority to order mediation over Amtrak's objection, those regulations also provide that if a party is ordered into mediation over its objection, the proceedings may not be stayed while mediation is ongoing. *See* 49 C.F.R. 1109.3(e) ("Where one or both parties to mediation do not voluntarily consent to mediation, the Board will not hold the underlying proceeding in abeyance and statutory deadlines will not be tolled."); *cf. Cent. Valley Ag Grinding, Inc. & Cent. Valley Ag Transp. Inc. v. Modesto and Empire Traction Co.*, NOR 42159, slip op. at 6 (S.T.B. served July 25, 2018) (when a party conditions its consent to mediate on not holding the proceeding in abeyance, the proceeding will not be held in abeyance); *accord The Metro. Council – Petition for Declaratory Ord.*, FD 36178, slip op. at 2 (S.T.B. served June 1, 2018); *BNSF Railway Company – Terminal*

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<sup>2</sup> It is unclear what CSX and NS are proposing with respect to a "modified technical conference" with "Board staff" that would be used to "fully educate the Board on the modeling work that was done," Mot. at 4, but if the Board were to order mediation over Amtrak's objection, clearly it would be improper for Board staff to be involved in both this proceeding and any mediation.

*Trackage Rights – Kansas City Southern Railway Company and Union Pacific Railroad Company*,  
FD 32760, slip op. at 2 (S.T.B. served May 15, 2018).

Moreover, the Board should not grant CSX, NS, and the Port any extension beyond June 13<sup>th</sup> to present additional evidence. As Amtrak will argue more fully later, the carriers already had a more-than-adequate opportunity to meet their statutory burden of demonstrating unreasonable impairment and they failed to meet that burden. At the close of the hearing on the record, the Board nonetheless granted all parties an additional 30 days to offer supplemental evidence. It is Amtrak's position that this invitation for additional evidence was improper, and Amtrak will present this argument at the appropriate time. But in any event, affording CSX, NS, and the Port even more time to try to rehabilitate their case when they did not meet their burden of demonstrating unreasonable impairment during an eleven-day evidentiary hearing is unwarranted.

### CONCLUSION

For the reasons set forth above, Amtrak urges the Board to deny the request for Board-sponsored mediation, deny the request for a stay of proceedings, and deny the request for an extension to present additional evidence.

May 20, 2022

Respectfully submitted:

/s/ Jessica Ring Amunson

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**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.

May 20, 2022

/s/ Jessica Ring Amunson  
Jessica Ring Amunson