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**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**

**CSX TRANSPORTATION, INC.’S SECOND STATUS REPORT
CONCERNING AMTRAK’S MOTION TO COMPEL AND MOTION FOR
REDESIGNATION AND PRODUCTION OF RAIL TRAFFIC CONTROLLER
STUDY MATERIALS**

Pursuant to the Board’s order of July 1, 2022, CSX Transportation, Inc. (“CSXT”) respectfully submits this second status report concerning outstanding matters raised in the National Railroad Passenger Corporation’s (“Amtrak’s”) Motion to Compel and Motion for Redesignation and Production of Rail Traffic Controller Study Materials.

While CSXT continues to believe that the Motion to Compel was meritless, CSXT engaged in regular discussions with Amtrak in an effort to resolve the Motion to Compel and produced extensive amounts of information in response to Amtrak’s supplemental interrogatories. CSXT first provided sample documents for Amtrak to review for responsiveness and usefulness. CSXT then completed two productions of documents on June 27 and June 29, 2022, and provided written responses to certain interrogatories on June 30, 2022. Nevertheless, Amtrak indicated to CSXT on July

5, 2022 that it is not satisfied as to CSXT's responses on two discrete issues. Those issues are addressed below.

I. CSXT MADE EXTENSIVE CONCESSIONS TO RESOLVE AMTRAK'S MOTION TO COMPEL.

CSXT continues to oppose Amtrak's Motion to Compel responses to its supplemental interrogatories served on CSXT following the conclusion of the evidentiary hearing on May 12, 2022. As more fully set forth in CSXT and Norfolk Southern Railway Company's ("NSR's") opposition filed on May 31, 2022, Amtrak's efforts to obtain additional discovery are procedurally improper and prejudicial. Amtrak had a full and fair opportunity under the Board's original procedural schedule to seek the information that is the subject of these untimely supplemental interrogatories.¹ Nothing in the Board's May 12 comments on the record or the May 17 Decision suggested that the Board intended to reopen discovery.² And Amtrak failed to explain its need for the material sought in its Motion to Compel.³

Nevertheless, CSXT negotiated with Amtrak about document productions that would satisfy Amtrak's requests, and CSXT produced substantial data to Amtrak. Specifically, in discussions with CSXT, Amtrak identified three categories of information it was seeking from CSXT. Amtrak sought information that would enable it to: (1) compare the Gulf Coast line to other lines that are similar in

¹ CSXT-NSR Opposition to Amtrak's Motion to Compel at 2–6.

² *Id.* at 4.

³ *Id.* at 6–7.

relevant ways (Interrogatory Nos. 3, 4, and 5); (2) assess the impact to customers on the Gulf Coast line (Interrogatory Nos. 6, 7); and (3) evaluate construction costs for the proposed infrastructure (Interrogatory No. 8). In response to Category 1, CSXT agreed to produce timetables and data on operational metrics for the 51 subdivisions over which Amtrak operates passenger trains. These operational metrics and timetables covered the time period of January 1, 2019 to September 8, 2021. (CSXT previously produced these operational metrics and timetables for the two Gulf Coast subdivisions last fall.)

Category 2 consisted of two requests, one of which asked CSXT to produce any information that it might rely on to demonstrate the impact of Amtrak service on freight customers long the Gulf Coast passenger route (Interrogatory No. 7) and the other which asked for detailed historical service data for customers on the line, including “[w]eekly percentage of cars delivered to each customer within four hours of the estimated time of arrival for 2019, 2020, 2021, and 2022” (Interrogatory No. 6).⁴ For Interrogatory No. 7, CSX produced additional OS Data (train data) and on duty times for the time period of January 1, 2019 to May 31, 2022,⁵ and informed Amtrak that CSXT would not rely on any data that had not been produced to Amtrak or previously been made available in workpapers. For Interrogatory No. 6, CSXT explained that it had not identified a complete data set of customer service metrics that would be useful, reliable, and producible. CSXT also explained that

⁴ Amtrak’s Motion to Compel, Exhibit A at 6.

⁵ CSXT had already produced 2019 and 2020 OS Data during discovery last fall.

creating the kind of material sought in Interrogatory No. 6 would require a special study.

In response to Category 3, CSXT first offered to produce capital cost information in the form of Authorizations for Expenditures. After Amtrak concluded that the format and volume of such documentation would not be useful in this proceeding, CSXT instead provided a written response to Amtrak's Interrogatory No. 8 concerning systemwide averages for specific capital cost expenditures.

II. REMAINING ISSUES

While CSXT had hoped that the parties would be able to submit a joint report with Amtrak representing that all issues have been resolved, Amtrak indicated on July 5, 2022 that it was dissatisfied with CSXT's responses as to two issues.

First, Amtrak indicated that it continues to seek the production of workpapers associated with any RTC analyses performed by Mr. Mark Dingler but not yet submitted into evidence. As more fully set forth in CSXT and NSR's opposition filed on May 31, 2022, Amtrak's efforts to obtain RTC workpapers that support analysis not submitted into evidence from an adversary's experts violates the work product doctrine⁶; provides Amtrak an unfair advantage by permitting them to preview CSXT and NSR's legal strategy after objecting to the introduction of supplemental RTC analysis during the hearing⁷; and essentially forces CSXT and

⁶ CSXT-NSR Opposition to Amtrak's Motion for Redesignation and Production of Rail Traffic Controller Study Materials at 10.

⁷ *Id.* at 9–10.

NSR to submit evidence that they might otherwise choose not to for strategic reasons.⁸ If CSXT and NSR choose to submit any supplemental RTC analyses into the record on July 13, 2022, Amtrak will receive any final expert report and underlying workpapers at that time.

Second, Amtrak indicated that it is dissatisfied with CSXT's production of customer impact data, claiming that CSXT failed to produce "any data related to impacts to customers." In the first place, that is not true. CSXT did produce performance metrics for all subdivisions over which Amtrak operates, which includes customer-facing metrics like CSD. And CSXT produced complete OS Data to Amtrak and has produced all data on which it may rely to demonstrate the impact of Amtrak service on CSX customers. Interrogatory No. 7 has thus been completely responded to. All that remains is Interrogatory No. 6's request for CSXT to perform a study of historical customer service performance to Gulf Coast customers from 2019 through 2022. That special study request would be inappropriate discovery even if it occurred during the regular discovery period, and it is plainly improper here.⁹

⁸ *Id.* at 10–11.

⁹ See, e.g., *Finch Paper LLC—Petition for Declaratory Order*, STB Docket No. FD 35981 (served Jan. 18, 2017), slip op. at 3. ("Discovery obligations generally require responsive information to be provided only to the extent and in the form it is customarily maintained by the responding party. They do not require the responding party to conduct any 'special study' to compile information not customarily maintained by the responding party or to provide information customarily maintained by the responding party in a different form than the responding party customarily maintains it."); *Entergy Ark., Inc. v. Union Pac. R.R.*, Docket No. NOR 42104, slip op. at 6 (S.T.B. served May 19, 2008) (declining to

Respectfully submitted,

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require a railroad to “conduct special studies or attempt to recreate information that was not kept in the ordinary course of business”).

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July 2022, a copy of the foregoing
Second Status Report Concerning Amtrak's Motion to Compel and Motion for
Redesignation and Production of Rail Traffic Controller Study Materials was served
by email or first-class mail on the service list for Finance Docket No. 36496.

/s/ Matthew J. Warren

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