

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

STATUS REPORT OF AMTRAK IN RESPONSE TO THE BOARD'S ORDER OF JULY 1, 2022

The National Railroad Passenger Corp. (“Amtrak”) files this status report in response to the July 1, 2022 order of the Surface Transportation Board (“Board”).¹

On May 12, at the conclusion of the evidentiary hearing in this matter, the Board stated that certain items were missing from the record and invited the parties to supplement their evidence. Amtrak quickly determined that it required additional information from CSX and NS to address items identified by the Board. As a result, on May 17, 2022, Amtrak propounded supplemental interrogatories to CSX and NS. Rather than engaging with Amtrak on those supplemental interrogatories, CSX and NS stated that they would not respond to the interrogatories at all. Left with no choice, Amtrak promptly filed a motion to compel. In its decision of June 10, 2022, the Board noted that “Amtrak may have difficulty responding to [the Board’s] suggestions without at least some of the information sought in its supplemental interrogatories” and encouraged the parties to use that preliminary view as a guide in resolving their discovery dispute. June 10, 2022 Decision at 4.

¹ Amtrak met and conferred with CSX Transportation, Inc. (“CSX”), and Norfolk Southern Railway Company (“NS”) about this status report and the parties determined that it was necessary to file separate status reports, including because of the condensed timeline for the parties to provide submissions.

Following the Board's June 10, 2022 decision, Amtrak requested that CSX and NS reconsider their position on Amtrak's supplemental interrogatories. The parties then met and conferred with respect to the material sought in Amtrak's motion for redesignation and motion to compel. During those discussions, and with the goal of finding a reasonable and mutually agreeable path forward, Amtrak narrowed its requests considerably. Now, in response to the Board's July 1 Order, Amtrak reports on the status of discussions concerning its supplemental interrogatories, as well as productions made in response to those supplemental interrogatories, and outstanding requests from the motion to compel or for redesignation that still require Board resolution.

(1) **Information that Would Allow the Board to Compare Performance on Other**

Lines: CSX and NS took different approaches to answering Amtrak's Supplemental Interrogatory 3.

CSX: On June 27 and June 29, CSX produced to Amtrak track charts and various operational metrics from January 1, 2019 to September 8, 2021, for each of the 51 CSX subdivisions over which Amtrak operates passenger trains. This information is in the same form CSX already provided for the New Orleans to Mobile (NO&M) and Mobile to Montgomery (M&M) subdivisions. While this information does not precisely track what Amtrak requested in Interrogatory 3, Amtrak appreciates that CSX worked with Amtrak in good faith to reach a compromise and does not seek Board intervention with respect to the CSX production.

NS: Unlike CSX, NS refused to provide information for all NS segments over which Amtrak operates. After numerous meet-and-confers, NS and Amtrak eventually reached an agreement for NS to choose three segments that it claimed were comparable to the Back Belt and for Amtrak to choose three segments that it claimed were

comparable to the Back Belt, with NS answering Interrogatory 3 for all six segments. However, NS informed Amtrak that it would not be able to answer the subparts of Interrogatory 3 asking for average minutes of freight train delay per 100 miles, average freight train speed, and average number of re crews for these six segments in a manner that would allow comparison to what was reported in the 2021 RTC study. NS stated that it would provide only average freight train speed information for these six segments, and that average speed would be calculated in a different method than that used in the RTC study. NS provided information as to the six selected segments on June 30 and July 1. However, NS subsequently informed Amtrak that it had discovered errors in the average freight train speed information provided for two of those segments. Corrected data was not produced until July 5.

Additionally, in order to make an apples-to-apples comparison, Amtrak repeatedly requested that NS provide Amtrak with average speed information for the Back Belt in the same way NS was calculating speed for the other six segments. NS repeatedly refused. According to NS, providing that information for the Back Belt would “confuse the record” because NS had previously calculated average speed information using its RTC study. In other words, NS refused to provide the calculation because it would generate a different result than its RTC study.

Faced with that refusal, Amtrak informed NS that litigants frequently calculate the same metric in different ways. Amtrak also noted that the litigants and Board Members in this proceeding are more than capable of understanding that two different estimates of velocity on the Back Belt result from different methodological decisions. And Amtrak emphasized that it required the requested information in order to respond to questions posed by the Board. Still, NS was not willing to revisit its position.

Because NS certainly *can* provide the requested data (as it has for six segments), and because Amtrak requires it to provide the Board's requested comparison between the Gulf Coast and other similar lines, ***Amtrak requests that the Board order NS to immediately provide Amtrak with average speed information for the Back Belt that is calculated in the same way NS calculated speed for the six segments addressed in its supplemental production.***²

(2) **Information that Would Allow the Board to Determine Impacts to Customers:**

Amtrak sought this information only from CSX. CSX stated that it would not produce customer service metrics to Amtrak because CSX was unable to identify a complete data set of customer service metrics that it considered useful, reliable, and producible. CSX stated that to produce the material Amtrak was seeking would appear to require a "special study." ***Amtrak requests that the Board bar CSX from offering, citing, or otherwise relying on any new data or information about how restoration of Amtrak's Gulf Coast service will impact customers on the Gulf Coast line, given that CSX has not produced customer service evidence to Amtrak.***³

(3) **Information on Capital Improvement Costs:** CSX and NS again took different approaches to this.

CSX: On June 30, CSX responded by letter with estimates and information as to five capital project categories, including providing actual costs by bridge to remote lift and

² Amtrak reserves the right to request that the Board draw an adverse inference based on NS's refusal to provide information that is reasonably available and would enable Amtrak to draw apples-to-apples comparisons about average freight speed on the Gulf Coast and other segments. More specifically, Amtrak reserves the right to request that the Board draw an adverse inference that, following restoration of the Gulf Coast service, there will be no impact on average freight train speed for NS on the Back Belt.

³ Amtrak also reserves the right to request that the Board strike pleadings or portions of pleadings that contain, reflect, or rely on other data not produced during discovery or supplemental discovery in this proceeding.

swing span the bridges along the Gulf Coast. CSX designated this information highly confidential and said it could not be shared with Amtrak internal personnel.

NS: On June 24, NS produced to Amtrak two engineering cost sheets with geographic and temporal details redacted for the installation of a new universal crossover where one did not previously exist, and for the extension of a pre-existing siding by an additional 5,500 feet. NS claimed that with these two documents, Amtrak should be able to derive a reasonable representative of real-life examples of the NS internal material, labor, and non-billable additive costs that Amtrak was seeking in Interrogatory 7. NS claimed these would be typical costs for similar projects in recent years. NS stated that with regard to the bridge and miter rail costs, there was no such thing as an average cost associated with those types of projects and therefore it would not provide that information. Although Amtrak is not satisfied with NS's response, at this time, Amtrak is not seeking further Board intervention.

(4) **Additional RTC Analyses Performed by Mark Dingler**: CSX and NS have not agreed to provide materials related to the additional RTC analyses that Mr. Dingler testified he had already performed during the hearing on the record. Those analyses were apparently complete in May, and Mr. Dingler was prepared to testify about them during the hearing. As a result, there is no basis to withhold those analyses, other than to preclude Amtrak from scrutinizing and addressing them in its supplemental filing. ***Amtrak requests that the Board either order CSX and NS to provide these materials to Amtrak or bar CSX and NS from relying on them.***

Amtrak has no interest in slowing down these proceedings. However, CSX did not complete its supplemental production until June 30 and NS did not complete its supplemental production until July 5. To ensure that Amtrak and its experts have time to fully analyze and

incorporate this information into its supplemental filing, and ensure that Amtrak has sufficient time to analyze any additional information that the Board may Order CSX or NS to produce, Amtrak respectfully requests that the Board grant all parties one additional week, until July 20, 2022, to make their supplemental filings. NS and the Port consent to this request and CSX does not oppose it.

CONCLUSION

Based on the foregoing status report, and for the reasons stated herein, Amtrak respectfully requests that the Board resolve outstanding discovery requests from the Motion to Compel or from the Motion for Redesignation as follows:

- (1) Order NS to immediately provide Amtrak with average speed information for the Back Belt that is calculated in the same way that NS calculated average speed for the six segments provided in supplemental discovery;
- (2) Bar CSX from offering, citing, or otherwise relying on any new data or information about how restoration of Amtrak's Gulf Coast service will impact customers on the Gulf Coast;
- (3) Order CSX and NS to immediately provide to Amtrak the additional analyses that Mr. Dingler testified he had already performed during the hearing on the record, or else bar CSX and NS from relying on them; and,
- (4) Grant all parties a one week extension to submit their supplemental filings, extending the date for such filings to July 20, 2022.

July 6, 2022

Respectfully submitted:

/s/ Jessica Ring Amunson

Eleanor D. Acheson
Chief Legal Officer, General Counsel
& Corporate Secretary
National Railroad Passenger Corporation
1 Massachusetts Avenue, NW
Washington, DC 20001
(202) 906-3971

Jessica Ring Amunson
Kali N. Bracey
Jenner & Block LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Counsel for National Railroad Passenger
Corporation*

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 use of the service list, consistent with 49 C.F.R. § 1104.12.

/s/ Jessica Ring Amunson
Jessica Ring Amunson

July 6, 2022