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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496

Status Report

As directed by the Board's July 1, 2022 decision ("July 1 Decision"), Norfolk Southern Railway Company ("NSR") respectfully submits this status report regarding developments with the National Railroad Passenger Corporation's ("Amtrak") two motions that remain pending before the Board: (1) Amtrak's May 19, 2022 motion¹ requesting that the Board order CSXT and NSR to produce additional RTC analyses that Mark Dingler testified that he performed during the hearing on the record, as well as all supporting workpapers ("May 19 Motion"),² and (2) Amtrak's May 23, 2022 Motion to Compel NSR and CSX to respond to supplemental interrogatories that Amtrak served on CSXT and NSR on May 12, 2022 ("Motion to Compel").

With respect to the pending portion of Amtrak's May 19 Motion seeking studies performed by Mr. Dingler that were not submitted into evidence, NSR's position remains

¹ The portion of Amtrak's May 19, 2022 motion asking to redesignate all the materials produced in connection with the 2020 and 2021 Rail Traffic Controller (RTC) studies from "highly confidential" to "confidential, or modify the protective order served on April 14, 2021 to allow certain Amtrak personnel to access this highly confidential material was resolved by the Board on June 10, 2022, in Decision Id No. 51268.

² CSXT and NSR opposed Amtrak's motion. (See CSXT & NSR Reply, May 31, 2022.)

unchanged. Amtrak's efforts to obtain RTC studies and workpapers that support analysis that was not submitted into evidence violates the work product doctrine.³ Requiring production provides Amtrak an unfair advantage by permitting them to view documents that were not submitted into evidence and without providing CSXT and NSR an opportunity to respond to any arguments and testimony that Amtrak would make about those documents.⁴ It is also inconsistent with Amtrak's objections at the hearing to CSXT's and NSR's efforts to introduce new materials, which would, at that time, have allowed parties to comment and review on such new materials. Amtrak's new request to see new materials at this stage of the proceeding essentially forces CSXT and NSR to submit evidence that they chose not to submit for legal and strategic reasons. For these reasons and others previously submitted, the Board should deny the remaining relief Amtrak seeks in its May 19 Motion.

Concerning Amtrak's Motion to Compel, as explained by NSR and CSXT in its June 24, 2022 status report, the parties have been engaged in discussions about resolving the discovery dispute since the Board's June 10 Decision. After several meet and confers and numerous email exchanges, NSR agreed to produce certain information to Amtrak that generally falls into three buckets: (1) information that would allow Amtrak to view some operational metrics on selected other segments on the NSR that host Amtrak ("Operational Metrics"); (2) certain Operational Metrics information to extent NSR maintains it in the ordinary course of business related to NSR divisions that have Amtrak service; and (3) construction costs for analogous infrastructure improvements ("Capital Project Costs").

Since the June 10 Decision, NSR has made every effort to provide Amtrak the information that NSR agreed to provide in its meet and confers. Moreover, despite having no obligation to do so, NSR undertook a special project to create Operational Metrics information for six NSR segments where Amtrak also operates over an NSR line to allow Amtrak to perform an analysis of these segments. This project required NS to pull information that is not currently maintained in the normal course of business and NS further refined this project and data outputs to ensure accuracy and validity. Additionally, as a sign of good faith, and although not required to do so under any Board order, NSR agreed to allow the Amtrak individuals designated in the June 10 Decision to access the information that NSR was producing in response to the meet and confer – information that would otherwise be highly confidential.

Despite these efforts, Amtrak continues to express concern that NSR refused to perform yet another special project to analyze the Gulf Coast Corridor using the same methodology as the

³ CSXT and NSR Reply at 10.

⁴ In contrast, if CSXT and NSR do 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. CSXT and NSR would expect the same from Amtrak. Should Amtrak or CSXT and NSR desire to respond in writing to any supplemental RTC analyses performed by any party, the parties can seek permission from the Board to do so and the Board should modify the procedural schedule accordingly.

six other segments and using metrics that Amtrak requested. As NSR has repeatedly explained to Amtrak, our argument and evidence for the Back Belt relies on the RTC model and nothing else.

Amtrak has access to the OS data. As such, Amtrak's experts can analyze that data and determine NSR speed and other related metrics over the Gulf Coast Corridor. Amtrak can compare that information to other corridors where NSR hosts Amtrak and utilize such calculations in any comparison evidence that Amtrak decides to submit into the record. Amtrak has all the data it needs to perform whatever studies or analysis it requires. NSR should not have to perform yet another special study of the Gulf Coast Corridor using the methodology and metrics preferred by Amtrak when Amtrak could have performed its own study at any time during this proceeding.⁵ Because Amtrak has the information it needs and NSR has voluntarily provided the information requested except for speed on the Back Belt, the Board should deny any request by Amtrak asking the Board to compel NSR to produce even more data and for NSR to further study of the Gulf Coast Corridor.

NSR is submitting this individual status report because the parties were unable to agree on a joint status report. Please note that during the discussions regarding submitting a joint status report, Amtrak indicated that it intended to request a one-week extension of the current deadline to file supplemental evidence and that it would request that the evidence deadline for all parties be extended until July 20, 2022. Assuming Amtrak does request that extension in its status report, NSR consents to the extension so long as the extension is applicable to all parties.

Respectfully submitted,

/s/ **William A. Mullins**

William A. Mullins

Attorney for Norfolk Southern Railway Company

cc: Parties of Record

⁵ Despite discovery closing nine months ago, and NSR having no obligation to do so, NSR has undertaken tremendous effort to accommodate Amtrak's efforts to prepare and submit additional evidence. NSR objects to further discovery and additional special studies.