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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. AND NORFOLK SOUTHERN RAILWAY
COMPANY'S RESPONSE TO RELIEF SOUGHT IN AMTRAK'S
STATUS REPORT**

CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR") respectfully submit this brief response to the requests made in the status report filed by the National Railroad Passenger Corporation ("Amtrak") on July 6, 2022. In that status report, Amtrak asked the Surface Transportation Board ("Board") for rulings on three issues. First, Amtrak asks the Board for an order directing NSR to produce average speed information for the Back Belt using the same methodology that NSR utilized to provide operating data for other NSR-segments that host Amtrak. Second, Amtrak requests an order prohibiting CSXT from relying on any unproduced data concerning customer impacts of the proposed passenger service. And third, Amtrak asks for an order requiring production of workpapers for expert analyses that were not introduced at the evidentiary hearing (because of Amtrak's objections). Each of Amtrak's requests should be denied.

First, Amtrak already has the train movement data from which it can calculate NSR train speeds and other operational metrics for the Back Belt portion

of the proposed Gulf Coast passenger service route.¹ This data was provided as part of the data underlying the RTC study. Yet, this is not sufficient for Amtrak because it wants NSR to do yet another study of the Back Belt. As explained in its status report, NSR is not required to perform a special study to provide speed metrics calculated using Amtrak's preferred methodology.² And even assuming Amtrak's supplemental interrogatories were properly propounded, which they were not, the Board's discovery rules permit a party to respond to an interrogatory through the production of business records, which NSR has done.³ As such, NSR is under no further obligation to provide additional analysis or response on this topic. Amtrak's request for an order of production concerning NSR train speeds should be denied. Amtrak should be required to perform its own analysis using the data that it has been provided.

¹ See NSR Status Report at 3.

² 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.”); *Enterger Ark., Inc. v. Union Pac. R.R.*, Docket No. NOR 42104, slip op. at 6 (S.T.B. served May 19, 2008) (declining to require a railroad to “conduct special studies or attempt to recreate information that was not kept in the ordinary course of business”).

³ 49 C.F.R. § 1114.26(b) (permitting a party to respond to an interrogatory by providing business records from which an answer to that interrogatory may be derived and where the burden on either party of deriving the answer from those business records would be the substantially the same).

Second, Amtrak’s assertion that CSXT “has not produced customer service evidence to Amtrak” is incorrect.⁴ As CSXT explained in its status report, Amtrak received operational metrics for the two Gulf Coast subdivisions last fall, which “include[] customer-facing metrics like CSD.”⁵ Additionally, Amtrak received OS Data and on duty times for the Gulf Coast that spans 2019 through mid-2022 and from which Amtrak can evaluate performance to customers.⁶ Regardless, Amtrak’s request for an order prohibiting CSXT from relying on unproduced data to make arguments about customer impact is moot. CSXT has repeatedly stated that it would “not rely on any data that had not been produced to Amtrak or previously been made available in workpapers.”⁷ Amtrak’s request for a Board order to this effect is unnecessary and meritless.

Third, Amtrak asks for an order compelling immediate production of workpapers related to certain RTC analyses performed by Mark Dingler that were mentioned at the evidentiary hearing but not introduced into evidence: namely, analyses concerning the operation of shorter freight trains and modifications to U.S. Coast Guard regulations concerning the operation of moveable bridges.⁸ As CSXT

⁴ Amtrak Status Report at 4.

⁵ CSXT Status Report at 2–3, 5. “Operational metrics” and “performance metrics” are used interchangeably in the status report.

⁶ *Id.* at 3 & n.5.

⁷ *Id.*

⁸ Amtrak initially sought “production of all additional RTC analyses performed by Mr. Dingler, along with any supporting workpapers, including *but not limited to* the additional analyses Mr. Dingler testified about at the hearing on the record.” Amtrak Motion for Redesignation at 7 (filed May 19, 2022) (emphasis added).

and NSR explained in prior filings, an order granting Amtrak’s demand for workpapers associated with RTC analyses not yet submitted into evidence would violate the work product doctrine,⁹ and provide Amtrak an unfair litigation advantage by allowing it to preview CSXT and NSR’s evidence in advance of a filing deadline, and strip CSXT and NSR of the freedom to choose how best to litigate their case by forcing them to submit evidence that they might have otherwise chosen not to submit for strategic reasons.¹⁰

In any event, CSXT and NSR explained in opposing Amtrak’s Motion for Redesignation and Production of Rail Traffic Controller Study Materials that Mr. Dingler was not asked to complete a final RTC report or prepare workpapers in advance of the evidentiary hearing.¹¹ The reason for this was twofold: (1) these issues were raised for the first time at the February 2022 public hearing, giving Mr. Dingler only a few weeks to conduct preliminary analysis and (2) the window for

Amtrak has since narrowed that request to just “the additional RTC analyses that Mr. Dingler testified he had already performed during the hearing on the record.” Amtrak Status Report at 5.

⁹ See FED. R. CIV. P. 26, 2010 Advisory Committee Notes, Rule 26 (Rule 26(b)(4) “provide[s] work-product protection against discovery regarding draft expert disclosures or reports.”); *id.* at Subdivision (b)(4) (“Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.”).

¹⁰ CSXT Status Report at 4–5 (citing CSXT-NSR Opposition to Amtrak’s Motion for Redesignation and Production of Rail Traffic Controller Study Materials at 9–11); NSR Status Report at 1–2 (same).

¹¹ CSXT-NSR Opposition to Amtrak’s Motion for Redesignation and Production of Rail Traffic Controller Study Materials at 10.

written submissions had ended.¹² If CSXT and NSR choose to submit supplemental RTC analysis on either the operation of shorter freight trains or modification of the U.S. Coast Guard's moveable bridge regulations on July 13, 2022, Amtrak will receive a final RTC report and corresponding workpapers at that time. Amtrak's request for workpapers related to expert analysis not yet in evidence is contrary to law, procedurally unfair, and should be denied.

* * *

CSXT and NSR have cooperatively engaged with Amtrak to respond to and resolve Amtrak's supplemental interrogatories despite the fact that those discovery requests are untimely and prejudicial. The Board should deny Amtrak's discovery-related requests in Amtrak's Status Report as well as the Motion to Compel as moot. Despite discovery not being reopened, CSXT and NSR voluntarily responded to Amtrak's discovery requests in a cooperative manner. Those responses may not be to Amtrak's liking, but nothing in the discovery rules states a party is entitled to obtain everything they want and in the form they want it. The Board should deny Amtrak's Motion for Redesignation and Production of Rail Traffic Controller Study Materials to the extent it seeks expert work product not yet submitted into evidence.

¹² *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July 2022, a copy of the foregoing Response to Amtrak's Status Report 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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