

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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Part of
Public Record

Docket No. FD 36695

**PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF –
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

**RESPONSE OF KELLOGG COMPANY TO
REQUEST FOR SUPPLEMENTAL INFORMATION**

Kellogg Company (“Kellogg”) hereby submits this response to the Decision served by the Surface Transportation Board (“Board” or “STB”) on May 18, 2023 (“*May 18 Decision*”) that granted Kellogg’s Petition for Leave to Intervene in this proceeding, and also in part directed Kellogg to provide certain supplemental information related to the declaratory, injunctive, and other relief Kellogg has sought in response to the National Railroad Passenger Corporation’s (“Amtrak”) plan to cause the cessation of all freight rail service to Kellogg’s facility in Lancaster, Pennsylvania (the “Lancaster Facility”) for period of six weeks starting on or around July 25, 2023. As intervenor, Kellogg has adopted the requested declaratory, injunctive and other relief in Sections III and IV of the Petition for Declaratory Order and Injunctive Relief (“Petition”) filed by the Wenger Group, Inc. and Esbenshade Inc. (“Petitioners”).

A. Requests for Specific Information

Kellogg provides the following supplemental information in response to the three specific requests set forth in the *May 18 Decision*:

(1) Identify what, if any, of [Kellogg's] traffic at issue moves pursuant to common carrier tariff and what, if any moves under contract.

The inbound rail deliveries by Norfolk Southern Railway (“NSR”) of the ingredients for the cereals manufactured by Kellogg are all pursuant to “delivered” freight terms, meaning that the parties from whom Kellogg purchases the ingredients arrange with NSR for the transportation and directly pay the rates established by NSR for such transportation. Kellogg accordingly has no contracts with NSR for rail service, nor does it arrange for shipments pursuant to the terms of NSR’s tariffs. Because its suppliers arrange for transportation with NSR, Kellogg has no direct visibility as to which of the inbound movements move pursuant to a rail transportation contract or a NSR tariff.

However, on information and belief as a result of inquiries by Kellogg to NSR in preparation of this Supplemental Filing, it understands that most of Kellogg’s suppliers’ traffic moves pursuant to contracts, and a smaller percentage is transported pursuant to tariff rates and terms.

While not the direct payor of the freight costs to NSR,¹ Kellogg interacts daily with NSR as the delivering carrier to the Lancaster Facility, and Kellogg is subject to NSR’s operating tariffs that govern the physical switching of railcars in and out of the facility, and such matters as rail car demurrage and accessorial charges.

(2) State whether the track work impacting [Kellogg's] facility has begun or, if not, when it is expected to begin.

¹ The fact that Kellogg is not a direct payer of the freight charges to NSR does not deprive it of standing to pursue formal relief against Amtrak or NSR for alleged violations of 49 U.S.C. §11101 or any other provision of Title IV. 49 U.S.C. §11701(b); *see, STB Docket No. NOR 42159, Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. v. Modesto and Empire Traction Co.*, (served July 25, 2018) at 4-5 (where standing to bring formal complaint alleging violations of §§11101, 10702 and other provisions was found even though the shippers of the commodities received by the complainant arranged for transportation and paid all the line-haul freight rates).

The track work that will impact the Lancaster Facility has not begun. Kellogg's understanding is that the current date upon which NSR's service to the facility would be impacted by the planned track work is July 25, 2023.

(3) State whether, to Kellogg's knowledge, there has been any change in the potential impact on its facility, in light of the settlement in principle between Amtrak and Petitioners.

Kellogg is not privy to the terms of the settlement in principle between Amtrak and Petitioners, but from other information Kellogg knows the settlement will not result in any reduction to the irreparable harm the outage from the planned track work will cause to Kellogg's Lancaster Facility.

B. Reply to Amtrak's Arguments on the Board's Authority

In the *May 18 Decision*, the Board directed Kellogg to address Amtrak's arguments in its Reply to the Petition concerning the Board's authority to issue a directed service order under 49 U.S.C. §11123 or to enjoin Amtrak under 49 U.S.C. §1321 in light of the language in 49 U.S.C. §24301 "exempting Amtrak from much of the Interstate Commerce Act."² In response, Kellogg states as follows:

1. The Authority of the Board to Enjoin Amtrak

The Petition (incorporated by reference in Kellogg's Petition for Leave to Intervene) explained that Amtrak, when it acquired the Subject Line,³ also acquired the underlying common carrier obligation to provide rail freight service on reasonable request.⁴ Consequently, if NSR is

² *May 18 Decision* at 2.

³ Defined in the Petition as the line of railroad owned by Amtrak that runs between a point just east of Rheems PA and Lancaster, PA. Petition at 3.

⁴ See Petition at 11. Amtrak's obligation to provide freight service is triggered only if NSR does not provide service or (as in this case) is prevented by Amtrak from providing service. See e.g., *Florida DOT—Acquisition Exemption --Certain Assets of CSX Transportation*, FD 35110, slip of at 8-9, (STB served Dec. 15, 2010).

prevented from providing freight rail service to Kellogg and other rail shippers along the Subject Line, Amtrak has the legal obligation to provide, or cause to be provided, service upon reasonable request pursuant to 49 U.S.C. §11101 or be liable for damages or injunctive and other relief for failing to fulfill this statutory obligation.

The Petition also cited and relied upon *Nat'l R.R. Passenger Corp.-Conveyance of B&H Corp. Interests in Conn. River Line in Vt. & N.H.*,⁵ which held that Amtrak acquired a common carrier obligation to provide freight service when it purchased the line of railroad in that case. In *Connecticut River*, the Interstate Commerce Commission ("ICC") said:

4. *Amtrak's obligation post transfer.* One last item must be addressed. Through the §402(d) proceeding, Amtrak will purchase track that has been used for freight as well as passenger service. *In so doing, Amtrak will acquire the underlying common carrier obligation to provide freight service.* While Amtrak intends, in effect, to transfer this obligation and the track to CV, we remind it that the obligation remains if for some reason the Amtrak-CV transaction does not occur. ... (emphasis added).⁶

At the time *Connecticut River* was decided, the ICC did not have jurisdiction to regulate Amtrak routes and services.⁷ In finding Amtrak to be a common carrier and thereby subject to ICC jurisdiction, the ICC did not express any concern that it was regulating or encroaching on Amtrak routes and services. Amtrak's line owner underlying common carrier obligation did not implicate Amtrak's passenger routes and services.

Rather than address the issue posed by the Petition, Amtrak instead asserts that the "Board has repeatedly recognized that it 'lack[s] general authority over Amtrak's routes and services.'" citing *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. & Fla. Dep't of*

⁵ 4 I.C.C.2d 761, 807 (1988), (*aff'd sub nom. Bos. & Maine Corp. v. I.C.C.*, 976 F.2d 1444 (D.C. Cir. 1992))("Connecticut River").

⁶ *Id.*

⁷ 45 U.S.C. § 546(a)(3).

*Transp.*⁸ In *Fun Trains*, the Board held that it did not have jurisdiction over an intrastate passenger excursion train and that Amtrak's provision of crews and equipment to operate that train did not provide a basis to assert jurisdiction.⁹ The *Fun Trains* case and holding have no relevance whatsoever to the Board's jurisdiction over Amtrak's statutory obligations as the owner of a common carrier line of railroad to freight rail shippers located along its track.¹⁰

Next, Amtrak stridently asserts "it is well established that 'except for certain provisions ... Amtrak is not subject to the Board's jurisdiction.'"¹¹ However, this assertion is based solely on *dicta* contained in a footnote buried on page 58 of a 79-page Federal Railroad Administration-STB joint regulation on the procedures for the development and implementation of safety integration plans for freight rail mergers.¹² This hardly proves Amtrak's claim of exemption from Board oversight of Amtrak's role as an owner of a common carrier line of railroad is "well established."

⁸ Docket No. FD 33472, slip op. at 3 (STB served Mar. 5, 1998)(*"Fun Trains"*), Amtrak Reply at 10.

⁹ At the time *Fun Trains* was decided in 1998, Section 24301 had been amended by Pub. L. No. 105-134, § 401(2), 111 Stat. 2570, but the issues in the case arose in 1997 before the amendment, and the STB was applying the following 1997 statutory language:

(c) Application of subtitle IV.--(1) Part A of subtitle IV of this title applies to Amtrak, except for provisions related to the-- (A) regulation of rates; (B) abandonment or extension of rail lines used only for passenger transportation and the abandonment or extension of operations over those lines; (C) regulation of routes and service; (D) discontinuance or change of rail passenger transportation operations; and (E) issuance of securities or the assumption of an obligation or liability related to the securities of others.

See Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 904.

¹⁰ Indeed, in *Chicago Union Station*, *infra*, the Board conceded the "plain statutory language [of §24301] means that the Board may not regulate Amtrak's fares, nor may it dictate where or how Amtrak serves its passengers," *Chicago Union Station* at 5, which reinforces the irrelevance of Amtrak's arguments concerning "routes and services."

¹¹ Reply at 10.

¹² *Id.*

Likewise, Amtrak asserts “Section 24301(c) provides that most of Subtitle IV, including Section 11101(a), does not apply to Amtrak, and the Board therefore lacks jurisdiction to grant injunctive relief against Amtrak.”¹³ In another recent case involving Board jurisdiction over Amtrak, the Board said if the issue became ripe “Amtrak would need to do more than simply point to § 24301(c) and assume that the case is over.”¹⁴ Rather, “Amtrak would need to show that the statutory language exempting it from much of the Interstate Commerce Act specifically enables it to take actions that cause another regulated carrier’s facilities to be removed from the Board’s jurisdiction without any agency review or approval.”¹⁵ This case presents a very similar question, *i.e.*, whether §24301(c) specifically enables Amtrak, as the owner of a line of railroad subject to the Board’s jurisdiction, to take actions that cause another regulated carrier operating on that line to cease providing freight service for an extended period without any liability on the part of Amtrak as the owner of the residual common carrier obligation. However, despite the Board’s prior admonishment, Amtrak once again simply “point[s] to §24301(c).”

Kellogg submits that the Board’s jurisdiction over Amtrak as a rail line owner pursuant to 49 U.S.C. §§10501, 10901, and other provisions of Subtitle IV, is clear, does not implicate or regulate Amtrak’s passenger routes and services, and that the Board has the authority and responsibility to protect Kellogg and other shippers located on Amtrak-owned lines from unreasonable interruptions in service. Nothing in 49 U.S.C. §24301(c) specifically states that it overrides the Board’s jurisdiction over Amtrak as an owner of lines of railroad, and the well-

¹³ *Id.* at 11.

¹⁴ *Commuter Rail Division of the Regional Transportation Authority and Northeast Illinois Regional Commuter Railroad Corporation – Petition for Declaratory Order –Status of Chicago Union Station*, FD 36171, slip op at 5. op. at 5 (S.T.B. served Aug. 22, 2018) (“*Chicago Union Station*”). The Board found that the case was not ripe for a jurisdictional determination. *See id.* at 3.

¹⁵ *Id.*

established legal rules and principles applicable to owners of lines of railroad. For the Board to conclude that §24301(c) has such broad preemptive scope in the absence of such specificity would not only permit Amtrak to shut down freight rail service and severely disrupt shipper facilities as intends for Kellogg's Lancaster Facility, it would also concede to Amtrak the power to acquire and merge freight rail carriers into itself without Board authorization, the concurrent power to acquire and sell lines of railroad, and the power to abandon the rail lines of freight railroads,¹⁶ all without any Board authorization or oversight.

Amtrak tries to sidestep these issues of statutory interpretation by asserting *Chicago Union Station* has no application to Petitioners' allegations, arguing that no declaratory relief was granted in that case because it was deemed premature and the decision has no precedential effect.¹⁷ Specifically, Amtrak asserts that "the concern expressed by the Board in [the *Chicago Union Station* decision] about removing property from the Board's jurisdiction is irrelevant where, as here, ... there is no transfer of ownership taking place."¹⁸ However, while it completely misses - or intentionally avoids - the point of the Board's admonition in *Chicago Union Station*, Amtrak nevertheless appears to concede with this statement that if a transfer of a line of railroad were taking place in this case, the Board would have jurisdiction over the transaction (consistent with Amtrak's and CSX Transportation, Inc.'s ("CSX") position in *Amtrak PDO*, *infra*). Such jurisdiction necessarily includes (absent a *State of Maine*¹⁹ situation) the legal transfer of the

¹⁶ See *Chicago Union Station* at 5 (where Board asked Amtrak to explain in a later case how §24301(c) would not cause unlawful abandonments under 49 U.S.C. §10903 where Amtrak acquired a railroad subject to the Board's jurisdiction and then Amtrak subsequently removed that carrier from its system).

¹⁷ Amtrak Reply at 11-12 (This is the opposite of Amtrak's position on *Amtrak PDO*, *infra*, which Amtrak inconsistently argues is binding precedent even though no declaratory order was issued).

¹⁸ *Id.* at 12.

¹⁹ *Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C.2d 835 (1991) ("State of Maine"). The Petition cited the *State of Maine*

residual common carrier obligation to the acquiring party. If the Board has jurisdiction over Amtrak in the sale or lease of an Amtrak-owned line of railroad, it has jurisdiction over Amtrak to prevent the shutdown of freight rail service on an Amtrak-owned line.

Finally, Amtrak relies on *Nat'l R.R. Passenger Corp. & CSX Transp, Inc. – Pet. for Declaratory Ord.*,²⁰ which Amtrak says is a decision where the Board found that 49 U.S.C. §24301(c) did not provide the Board with regulatory authority over Amtrak.²¹ This is not true. In that case Amtrak and CSX jointly sought a declaratory order under the *State of Maine* principles that the Board did not have jurisdiction over a track lease transaction between them since CSX would retain the common carrier obligation to provide freight rail service.²² CSX and Amtrak secondarily argued that the Board generally did not have jurisdiction over lease agreements between Amtrak and owners of common carrier lines of railroad.²³ The Board concluded that there was no controversy in the case and did not issue declaratory relief.²⁴ Instead, it stated broadly – without saying precisely why – that it did not have jurisdiction over that particular *lease transaction* that utilized the *State of Maine* principles, not over *Amtrak in all respects*.²⁵ Amtrak's

case (Petition at 11), which established that an entity could acquire the land and rail assets underlying a line of railroad without ICC approval only if the selling rail carrier retained a permanent and unconditional easement and other rights to ensure that it could continue to meet its rail carrier obligation. *Id.* at 837. Absent this reservation of rights in seller, the ICC had (and now the STB has) jurisdiction over the transaction and the acquiring entity. *Id.* at 836-37. The ICC noted that the retained rights in *State of Maine* distinguished the case from an acquisition by the City of Austin, TX from Southern Pacific. In the latter case, the “city assumed a common carrier obligation (even though it did not intend to operate the line itself), because by acquiring full ownership of the line it necessarily assumed responsibility for contracting with, and ensuring continued service by, a rail operator.” *Id.* at 837, n. 6.

²⁰ Docket No. FD 35675, slip op. at 2 (STB. served Oct. 16, 2012)(“*Amtrak PDO*”).

²¹ Reply at 10.

²² *Amtrak PDO* at 1

²³ *Id.*

²⁴ *Amtrak PDO* at 2.

²⁵ *Id.*

attempt to stretch the Board's holding to one of stating it has no jurisdiction over Amtrak is in no way supported by the language of the decision.

Moreover, it is notable that the primary argument of Amtrak and CSX in that case was that the proposed lease transaction met the requirements of *State of Maine*. This means Amtrak believed that, absent CSX's retention of the requisite exclusive, irrevocable easement to continue to provide common carrier rail service, Amtrak's lease acquisition would have been subject to the Board's jurisdiction.²⁶

In summary, except for the first and irrelevant argument about Amtrak's routes and services, Amtrak has made no attempt to explain how §24301(c) specifically enables it, as the owner of a common carrier line of railroad, to dictate by fiat that indisputable reasonable requests for rail freight service may be summarily denied for whatever time period Amtrak determines is in its own best interest, and affected rail shippers and the serving freight railroad have no recourse and the Board itself is powerless to act on either's behalf. Nor does Amtrak attempt to suggest how freight shippers located on the Subject Line or other Amtrak-owned lines of railroad would be protected if §24301(c) is interpreted as Amtrak advocates. Amtrak also makes no attempt to reconcile the exemptions it has been granted under §23401(c) with the Board's broad authority and responsibilities to freight railroads and rail shippers under Title IV, in response to the Board's concerns and questions in *Chicago Union Station*. In the end, Amtrak cannot demonstrate Section §24301(c) specifically exempts Amtrak from the legal responsibilities of the owner of a line of railroad, or the from remedies available to rail shippers if a railroad breaches its statutory obligation to provide, or cause to be provided, common carrier service upon reasonable request. These

²⁶ Amtrak and CSXT devoted seven pages to this argument in their Petition for Declaratory Order and cited *State of Maine* and four additional cases on the same point. See Petition for Declaratory Order in FD 35675, at 7-14.

remedies include the Board's grant of injunctive relief under 49 U.S.C. §1321 and related relief under §11101.

2. The Board's Authority to Issue a Directed Service Order Under 49 U.S.C. §11123

If the Board declines to order injunctive relief, the Petition explains that “the Board could direct Amtrak to handle the movement of NSR traffic over Amtrak's lines under §11123(a)(1) or it could direct Amtrak to continue ‘operations and dispatching, maintenance, and other necessary infrastructure functions related to operations’ of NSR under § 11123(a)(5).”²⁷ In either case, Amtrak and NSR would have at least 30 days to work out a feasible way to accomplish necessary track work while still providing rail freight service.”²⁸

In response, Amtrak conflates sections §11123(a)(1) and (a)(5) and then ignores that relief available under §11123(a)(1) is not dependent on the ownership of the line at issue. Amtrak first argues that it is not subject to §11123(a)(1) as the owner of the Subject Line because of the “Board's limited powers over Amtrak.”²⁹ However, this argument fails because §11123(a)(1) relief is not tied to ownership. Rather, it is available when the Board determines that “an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States or that a rail carrier providing transportation subject to the jurisdiction of the Board . . . cannot transport the traffic offered to it in a manner that properly serves the public.”³⁰ Here, cessation of NSR operations would be unlawful, the situation is an emergency and NSR will be prevented from transporting traffic offered to it in a manner that properly serves the public. Amtrak owns the Subject Line and Amtrak is subject to STB

²⁷ Petition at 18.

²⁸ *Id.*

²⁹ Reply at 21.

³⁰ §11123(a). STB Docket No. 36609, *Foster Poultry Farms, Ex Parte Petition for Emergency Service Order* (STB served June 17, 2022) at 2.

jurisdiction (see above at 3-4), but neither of these points is a prerequisite for the relief under §11123(a)(1).³¹

Amtrak also says that §11123 is not a general grant of emergency power, with a citation to, but no discussion of, *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 494 (7th Cir. 1980).³² The rest of the paragraph where this case is cited is about §11123(a)(5). Amtrak also makes the now flatly unpersuasive argument that this is not a situation requiring immediate action.³³ Amtrak's attempts to refute the applicability of §11123(a)(1) are unavailing. The Board has the clear authority under this provision to direct the handling, routing, and movement of traffic of NSR (a rail carrier) and NSR's distribution of traffic over the Subject Line.

Amtrak next argues that §11123(a)(5) does not apply here, because “[a]s Congress stated, a directed service order with respect to Amtrak would arise ‘in the case of a failure of existing freight or commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation,’” and was intended to “direct the continuation of the operations and dispatching, maintenance, and other necessary infrastructure functions related to the operations. *Id.* § 11123(a)(5).”³⁴ Assuming, *arguendo*, that this is a valid construction of the statute, it does apply here. Specifically, the track project will entail Amtrak ceasing to provide passenger service over the main line to which Kellogg's Lancaster Facility is connected. This “cessation of [passenger] service by [Amtrak]” will cause “a failure of existing freight . . . transportation operations.”³⁵ In such cases, the Board has the express authority to “direct the continuation of the [freight] operations and dispatching, maintenance and other necessary

³¹ Unless the Subject Line itself is not subject to Board jurisdiction, which Amtrak as not argued (at least not directly).

³² Reply at 21.

³³ *Id.* at 22.

³⁴ *Id.* at 21.

³⁵ §11123(a)(5).

functions related to the [freight] operations.”³⁶ In this remedy, the Board could direct Amtrak to allow NSR to continue to provide freight operations over the line while Amtrak conducted the track work in a manner that permitted such continued operations.³⁷ In summary, Amtrak’s arguments on the inapplicability of §11123 to itself in this context are erroneously focused on its role as a provider of passenger service, not as the owner of a common carrier line of rail over which freight service is being provided to rail shippers.

C. Conclusion

In conclusion, Kellogg respectfully submits the foregoing supplemental factual information and responses to Amtrak’s jurisdictional arguments in response to the *May 18 Decision*. As stated above, Amtrak’s claims that 49 U.S.C. §24301(c) exempts Amtrak from any and all of the legal responsibilities that are placed on all other owners of common carrier lines of railroad over which freight transportation is provided should be rejected. To do otherwise would result in the abdication of the Board’s powers to act in the public interest for Kellogg, other freight rail shippers and NSR and other freight railroads that use Amtrak-owned lines to provide rail freight service.

Respectfully submitted,



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³⁶ *Id.*

³⁷ Kellogg submits that the provisions of §11123(b)(3)(B) governing reimbursement of costs and indemnification would be inapplicable since NS already operates over the Subject Line pursuant to the parties Trackage Rights Agreement, and presumably those terms would apply.

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of May 2023, a copy of the foregoing Response of Kellogg Company to Request for Supplemental Information was served by email on all parties on the official Service List for Docket No. 36695.

/ss/ Thomas W. Wilcox