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

**AMTRAK’S REPLY TO INTERVENOR KELLOGG’S REQUEST FOR
DECLARATORY ORDER, INJUNCTIVE RELIEF,
AND DIRECTED SERVICE ORDER**

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INTRODUCTION

The National Railroad Passenger Corporation (“Amtrak”) remains committed to addressing the concerns of freight customers along the Harrisburg line (“Subject Line”) who will be impacted by Amtrak’s total track rehabilitation, which is essential to maintaining the continued safety and reliability of Amtrak’s rail infrastructure. From the time that Amtrak first informed Norfolk Southern (“NS”) about this important capital project approximately nine months ago, and continuing to the present day, Amtrak has repeatedly lived up to this commitment. During the months before the proceeding, Amtrak worked in good faith to open lines of communication and offered to speak directly to freight customers. After the action was filed, Amtrak engaged quickly and productively. Indeed, Amtrak has already finalized a settlement with the two Petitioners who originally brought this action, and Amtrak is also engaged in discussions with intervenor Kellogg Company (“Kellogg”) about a potential settlement.

As Kellogg has reported to the Board, the rehabilitation work that will impact its facility has not begun and is not expected to begin until July 25, 2023. In the interim, Amtrak will continue to focus on attempting to address the concerns presented in Kellogg’s petition. Amtrak continues to believe that the parties’ resources should be devoted to cooperation rather than litigation. Nevertheless, Amtrak hereby responds to the Board’s order of May 18, 2023. That order set a deadline of May 30, 2023 for Amtrak to reply to Kellogg’s petition for declaratory and injunctive relief and a directed service order. For the following reasons, the Board should deny Kellogg’s petition.

First, Kellogg’s request for declaratory and injunctive relief is entirely predicated on the common carrier provisions in Section 11101(a). However, as Congress expressly determined in Section 24301(c), those provisions do *not* apply to Amtrak. Kellogg and NS provide no basis for

the Board to ignore the clear statutory language of Section 24301(c). Instead, Kellogg and NS ask the Board to substitute their views of appropriate policy for the judgment of Congress, which the Board cannot do.

Second, Kellogg has confirmed in its response to the Board's request for supplemental information that "most" of its rail traffic moves pursuant to contract. This undermines Kellogg's petition and request for extraordinary relief. It is well settled that the Board lacks authority over movements conducted pursuant to transportation contracts. At the very least, the Board should decline to grant any relief until Kellogg or NS provide the information necessary for the Board and Amtrak to evaluate the parameters of Board jurisdiction over Kellogg's rail traffic.

Third, even if Section 11101(a) applied to Amtrak, and the Board had jurisdiction to order the requested declaratory relief, there is no basis to do so here. Kellogg seeks an unprecedented order declaring a "*per se* violation" of Section 11101, an extraordinary remedy that is not merited here. Moreover, the anticipated track rehabilitation work is not expected to affect Kellogg until July 25, 2023, at the earliest. As a result, any dispute between Kellogg and Amtrak is not ripe, and declaratory relief is not warranted.

Fourth, even assuming *arguendo* that the Board has jurisdiction, Kellogg has not met the exacting standard for obtaining injunctive relief. In fact, Kellogg cannot satisfy a single element of the standard. Any harm to Kellogg is not imminent, which renders the request for injunctive relief premature. Kellogg is also unlikely to succeed on the merits, since it has not shown that the service impact is unreasonable under the traditional totality-of-the-circumstances test. Furthermore, because the harm that Kellogg describes can be redressed by money damages, or is otherwise speculative, it is not irreparable. The public interest also weighs in favor of allowing

Amtrak to complete its important track rehabilitation efforts, which are necessary to maintaining the continued safety and reliability of Amtrak's rail infrastructure.

Finally, for the reasons that Amtrak previously explained and expands upon herein, a directed service order under Section 11123 is neither available nor warranted.

In sum, Amtrak respectfully requests that the Board deny Kellogg's requests for declaratory and injunctive relief. In the alternative, the Board should defer any action on those requests pending further information from the parties on the status of their efforts to resolve this matter. Amtrak is willing to provide such updates upon whatever schedule would be helpful to the Board.¹

I. FACTUAL BACKGROUND

On April 24, 2023, Petitioners filed a Petition for Declaratory Order and Injunctive Relief ("Petition" or "Pet."). On May 1, 2023, Amtrak filed its Reply to Petitioners' Requests for Injunctive Relief and a Directed Service Order ("Reply"). Amtrak and Petitioners have since reached a mutually agreeable settlement, and Petitioners have now filed a motion to dismiss their Petition with prejudice ("Motion to Dismiss").

On May 4, 2023, Kellogg filed a Petition for Leave to Intervene ("Kellogg Pet.") in the proceeding. In the Intervention Petition, Kellogg adopted and incorporated by reference "the requests for declaratory, injunctive and other relief in Sections III and IV of the Petition." Kellogg Pet. at 1. On May 18, 2023, the Board granted Kellogg's request to intervene. In the May 18

¹ Amtrak disagrees with Kellogg's assertions regarding Amtrak's compliance with the Board's rules on settlement discussions. Kellogg Ltr. at 2 (May 26, 2023). Nothing in Amtrak's May 26 filing provided any information about any "conduct or statements" made by any party during any settlement discussions. Cf. 49 C.F.R. § 1109.3(d). Instead, Amtrak's filing simply stated: "Amtrak and Kellogg have engaged in discussions by videoconference regarding the potential to reach a mutually agreeable settlement. Those discussions are expected to continue." Amtrak Ltr. at 1 (May 26, 2023). This was the same language the parties previously submitted to the Board in response to the Board's request for a status report. Moreover, Kellogg was given the opportunity to review this language before submission, but offered no objection to Amtrak's statement.

Decision (“Decision”), the Board directed Kellogg to provide supplemental information and to respond to certain arguments raised by Amtrak by May 23, 2023. Decision at 2-3. The Board also directed NS to submit as supplemental information on May 23, 2023 “its recommendations regarding feasible alternatives to Amtrak’s approach to the track work that would allow for continued freight rail service.” *Id.* Finally, the Board directed Amtrak and NS to submit replies to the initial Petition for declaratory order, as well as Kellogg’s request for injunctive relief and a directed service order, by May 30, 2023. *Id.* In its Decision, the Board did not order Amtrak to reply to NS’s supplemental information on (purported) alternatives to Amtrak’s existing workplan.² *Id.*

Amtrak has made good faith efforts to work with all stakeholders to solicit and address concerns from NS and its freight customers, and remains committed to resolving this matter without the need for further Board action. Amtrak offered to speak directly to freight customers (or shippers) during its preparation for this important track rehabilitation and promptly initiated conversations with Petitioners and with Kellogg after submission of their respective petitions. Amtrak remains in discussion with Kellogg and is hopeful that the parties will find an amicable resolution that moots the Petition. In responding here to the Board’s order to respond to Kellogg’s petition, Amtrak adopts and incorporates by reference the Factual Background in its May 1, 2023 Reply.

² NS’s submission is currently under careful review by Amtrak’s Infrastructure Maintenance and Construction Services (“IMCS”), Capital Delivery (“CAPD”), and Host Railroad Groups. Consistent with the May 18, 2023 Decision, and the Board’s default rules, Amtrak will submit its reply to the Supplemental Information submitted by NS by June 12, 2023. See 49 C.F.R. § 1104.13(a). Should the Board accept NS’s effort to restyle the supplemental information as a “reply,” then Amtrak respectfully submits that due process requires that Amtrak be entitled to respond to that new substantive filing. Given that the track work is not expected to impact the Kellogg facility until July 25, 2023, the Board will have ample time to consider the record in a timely manner following Amtrak’s submission of its June 12, 2023 response to NS’s May 23, 2023 filing.

II. THE BOARD LACKS JURISDICTION TO ISSUE DECLARATORY OR INJUNCTIVE RELIEF AGAINST AMTRAK UNDER SECTION 11101(a)

Kellogg’s request for declaratory and injunctive relief is predicated on a purported violation of Section 11101(a), which provides that a “rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.” 49 U.S.C. § 1101(a). That statute does not apply here. Amtrak is not subject to the jurisdiction of the Board under the relevant part and is not the rail carrier providing the freight service. For these reasons and others, elaborated below, the Board lacks authority to issue the requested relief.

As described in Amtrak’s May 1 response, Congress has explicitly delineated the Board’s limited authority over Amtrak, which does not extend to Section 11101(a)—the basis for Petitioners’ requested declaratory and injunctive relief.³ Section 24301(c) states: “Subtitle IV of this title **shall not apply to Amtrak**, except for sections 11123, 11301, 11322(a), 11502, and 11706.” 49 U.S.C. § 24301(c) (emphasis added). Section 11101 is indisputably part of Subtitle IV, but is not listed as one of the sections applicable to Amtrak. *Id.* The only conclusion from the plain text of the statute is that Section 11101 does not apply to Amtrak. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (emphasizing that courts must “enforce plain and unambiguous statutory language according to its terms.”); *id.* (collecting cases). The arguments made by Kellogg and NS to the contrary are unavailing.

First, Kellogg and NS’s arguments about Section 24301 are without merit. In its May 23, 2023 response to request for supplemental information (“Kellogg Resp.”), Kellogg writes that

³ Although Kellogg, like Petitioners, requests an injunction under 49 U.S.C. § 1321(b)(4), that provision provides no basis for relief here. Section 1321(b)(4) simply allows the Board to issue appropriate orders to prevent “irreparable harm” when carrying out provisions of Subtitle IV and Subtitle II, Chapter 13 of Title 49. *See* 49 U.S.C. § 1321(a). But Kellogg cannot demonstrate that the pertinent provisions of Subtitle IV apply to Amtrak in the first instance. Furthermore, Kellogg does not identify any basis for relief in Subtitle II, Chapter 13.

“[n]othing 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-established legal rules and principles applicable to owners of lines of railroad.” Kellogg Resp. at 6-7. But Congress expressly exempted Amtrak from the entirety of Subtitle IV—which is otherwise generally applicable to other owners of railroad lines—and Congress then enumerated specific exceptions. Under fundamental principles of statutory interpretation, “[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others.” *United States v. Johnson*, 529 U.S. 53, 58 (2000). There would have been no reason for Congress to enumerate the specific parts of Subtitle IV that *do* apply to Amtrak if Congress intended for other parts of Subtitle IV—including Section 11101—*sub silentio* to also apply to Amtrak. Kellogg’s reading would substitute Kellogg’s policy judgments for Congress’s statutory choices.

NS also misinterprets Section 24301 in its May 23, 2023 response to the Board’s request for supplemental information (“NS Resp.”). According to NS, the fact that “the prior wording of the Amtrak exemption was stated in the inverse—that is, it provided that Subtitle IV applied to Amtrak, except for certain enumerated sections,” NS Resp. at 14-15, means that Congress could not have intended to exempt Amtrak from generally applicable Section IV freight service obligations when it amended the statute. That argument also contradicts well-established canons of statutory interpretation. *See United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1067 (9th Cir. 2007) (“[W]hen a legislative body alters the wording of a statute, it is presumed to have intended a change in the law.” (internal quotation marks and citations omitted)). In amending Section 24301, Congress clarified the specific obligations of Section IV that it intended to apply to Amtrak, and Section 11101 was not one of the sections Congress enumerated.

Second, NS implies that the Board may find Amtrak, as well as any other third party not subject to Section 11101, nonetheless liable under Section 11101 for interfering with common carrier obligations if they “unreasonably infringe” on those obligations, or “otherwise take actions that would deny customers on the line of their federal right to freight service.” NS Resp. at 2. But as stated by a federal court in *Chicago Terminal Railroad Co. v. Burgoyne LLC*, “Section 11101 applies only to rail carriers and imposes no duty on private property owners.” No. 16 C 10606, 2017 WL 1103172, at *2 (N.D. Ill. Mar. 22, 2017). The *Burgoyne* court therefore dismissed a railroad’s Section 11101 claim against a company whose fences allegedly prevented the railroad from accessing a portion of its track. 2017 WL 1103172, at *1.

NS does not cite anything in support of its claim that the Board can “find actions by line owners that unreasonably interfere with freight rail operations to be in violation of the statute.” NS Resp. at 14. Although the Board has authority to void “contractual restrictions that unreasonably interfere with [] common carrier operations,” that authority exists in the context of the Board’s jurisdiction over “[t]ransactions that purport to separate the common carrier obligation from the underlying property interests[,]” which “implicate section 10901(a).” *Hanson Nat. Res. Co.—Non-Common Carrier Status—Pet. for a Declaratory Order*, FD 32248, 1994 WL 673712, slip op. at 3, 31 (ICC served Dec. 5, 1994). The Board is not being asked to evaluate any transaction here and, in any event, Section 10901 is another provision of Subtitle IV from which Amtrak is exempted. See 49 U.S.C. § 24301(c).

As to the applicable contractual arrangements here: {{

}}. NS Resp. at

16-17 and Ex. D. Indeed, {{

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Third, Kellogg and NS conflate the issue of whether Amtrak is a common carrier with the issue of whether Amtrak is subject to Section 11101(a) and therefore can be subject to a declaratory order or enjoined by the Board pursuant to that section's requirements. *See, e.g.*, Kellogg Resp. at 4 ("Amtrak acquired a common carrier obligation...."); NS Resp. at 11 ("Amtrak has the underlying common carrier obligation..."). Both argue that Amtrak is subject to Section 11101(a) because Amtrak is the owner of a line of railroad over which common carrier obligations apply and freight rail service is conducted. But the cases cited by Kellogg and NS about whether the common carrier obligation attaches or transfers are entirely inapposite. For example, Kellogg

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claims that “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.” Kellogg Resp. at 3 n.4. But the authority that Kellogg relies on for that proposition says exactly the opposite. In fact, because it is statutorily prohibited from doing so, *see* 49 U.S.C. § 24319(g), Amtrak “cannot provide freight rail service on the ... Line and will not hold itself out as a common carrier of freight on the line.” *Fla. DOT—Acquisition Exemption—Certain Assets of CSX Transp.*, FD 35110, slip op. at 7, (S.T.B. served Dec. 15, 2010). Just like the FDOT in the case relied upon by Kellogg, although Amtrak bears “responsibility for maintaining the lines at a standard that would permit both freight and passenger rail service,” Amtrak “would not have any duty to furnish the freight rail service.” *Id.* at 9; *see id.* at 8 (distinguishing a situation in which an operator seeks to “take over and operate the freight and passenger rail services on the line, with no qualifications”). Thus, Kellogg is wrong to claim that Amtrak would bear NS’s freight common carrier obligation. Moreover, the *State of Maine* line of cases relied on by both NS and Kellogg do not concern Amtrak, which acquired the Subject Line not through a private transaction, but rather pursuant to acts of Congress in the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, the Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, and the Final System Plan approved therein.⁵ Those cases do not bear on the core question: whether Amtrak is subject to

⁵ Under the *State of Maine* exception, “an entity acquiring a rail line may not incur the obligations of a common carrier: when “the licensed railroad” is “protected from undue interference with the provision of common carrier freight rail service by the owner of the rail line[.]” NS Resp. at 13. *State of Maine* and its progeny concern the impact of private transactions on common carrier and Section 11101 obligations. In contrast, Amtrak’s ownership of the Subject Line was established by statute, not by private transaction. *See* Petition at 6 n.7. Though Kellogg implies that the Board in *National Railroad Passenger Corp. & CSX Transportation, Inc. – Petition for Declaratory Order* held that it had no jurisdiction over a lease transaction because of *State of Maine* principles, the Board reached that conclusion instead because of its findings about the reach of Section 24301 over its jurisdiction. FD 35675, slip op. at 2 (STB. served Oct. 16, 2012) (“Amtrak, CSXT, and the Unions all take the position that, pursuant to the provisions of 49 U.S.C. § 24301, the transaction does not require such approval. Under the facts presented here, the Board has no reason to disagree. The Board does not have regulatory authority over this transaction.”).

Section 11101(a), given Section 24301(c)’s explicit delineation of the Board’s limited jurisdiction over Amtrak.⁶

Fourth, the cited cases that *do* involve Amtrak are also inapposite. Kellogg relies primarily on the Board’s decision in *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 (S.T.B. served Aug. 22, 2018) (“*Chicago Union Station*”). As described in Amtrak’s May 1 Response, the Board in *Chicago Union Station* was concerned about a transaction that would remove property from the Board’s jurisdiction.⁷ Similarly, *National Railroad Passenger Corp.-Conveyance of B&H Corp. Interests in Connecticut River Line in Vermont & New Hampshire*, 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)), also concerned a condemnation proceeding with the potential to remove property from the Board’s jurisdiction. But any concerns about private business deals shrinking the Board’s jurisdiction, or altering the rights of contracting parties, simply do not exist in this case. Kellogg therefore errs in likening the “Board [having] jurisdiction over Amtrak in the sale or lease of an Amtrak-owned line of railroad” to the Board

⁶ In its response, Kellogg criticizes Amtrak’s citations to *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transportation, Inc. & Florida Department of Transportation*, FD 33472, slip op. at 3 (S.T.B. served Mar. 5, 1998), *Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, & Acquisitions of Control*, EP 574, slip op. at 58 n.14 (S.T.B. served Mar. 8, 2002), and *National Railroad Passenger Corp.*, FD 35675, slip op. at 2. But Amtrak cited these cases to support the general principle that the Board has repeatedly recognized that its authority over Amtrak is explicit and limited, not because of any factual similarities.

⁷ As described in Amtrak’s May 1 Response, the Board’s comments on these issues were also dicta. The Board noted that, should another related petition for a declaratory order be filed later, Amtrak should be prepared to address whether its general exemption from Subtitle IV covers taking an action that could cause a facility “to be removed from the Board’s jurisdiction without any agency review or approval.” *Chicago Union Station*, FD 36171, slip op. at 5 (emphasis omitted). Petitioners’ efforts to place weight on this comment related to a hypothetical future petition is misplaced, particularly because, on the other side of the ledger, the Board also commented that Metra would “need to address the effect of Amtrak’s exemption” under that statute. *Id.* at 4.

having “jurisdiction over Amtrak to prevent the” temporary suspension “of freight rail service on an Amtrak-owned line.” Kellogg Resp. at 8. That conclusion is wholly unsupported.⁸

III. THE BOARD LACKS JURISDICTION TO ISSUE THE REQUESTED DECLARATORY AND INJUNCTIVE RELIEF OVER KELLOGG’S RAIL TRAFFIC

Kellogg’s petition presents an additional jurisdictional problem. Even if the Board had jurisdiction under Section 11101(a), Kellogg effectively concedes that the Board lacks jurisdiction over “most” of the rail traffic that is at issue in this case. Kellogg Resp. at 2. The Board’s Decision directed Kellogg to “identify what, if any, of its traffic at issue moves pursuant to common carrier tariff and what, if any, moves under contract.” Decision at 2. In response, Kellogg stated that “most” of its rail traffic moved pursuant to contracts. Kellogg Resp. at 2.

“It is well settled that the Board’s authority does not extend to those movements conducted pursuant to transportation contracts.” *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, NOR 42144, slip op. at 4 (S.T.B. served Dec. 21, 2015); *see* 49 U.S.C. § 10709(b)-(c). Section 10709 provides that “[t]he exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.” 49 U.S.C. § 10709(c)(2). Therefore, where transportation is performed pursuant to a contract, the “issues regarding the breach, or precise construction of [the contract’s] terms will have to be resolved in an appropriate court of law,” because the Board has “no jurisdiction to consider the matters[.]” *H.B. Fuller Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 550, 553

⁸ Kellogg also states that 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,’ which reinforces the irrelevance of Amtrak’s arguments concerning ‘routes and services.’” Kellogg Resp. at 5 n.10 (citation omitted). But the Board did not purport to list every instance in which it lacks authority over Amtrak. Moreover, the Board has elsewhere stated that Amtrak’s “rates, routes, services, *abandonments*, and route discontinuances are generally unregulated.” *Study of Interstate Com. Comm’n Regul. Responsibilities Pursuant to Section 210(a) of the Trucking Indus. Regul. Reform Act of 1994*, 1994 WL 639996, at *39 (I.C.C. Oct. 25, 1994) (emphasis added). Contrary to the thrust of Kellogg’s comments, the inclusion of “abandonments” on this list of things that Amtrak can do without Board regulation shows that the Board’s lack of jurisdiction extends to Amtrak in its capacity as the owner a rail line.

(1997); *see also Ameropan Oil Corp. v. Canadian Nat'l Ry. Co.*, NOR 42161, slip op. at 4 (S.T.B. served April 17, 2019) (“where transportation is provided pursuant to a contract, the Board lacks regulatory authority over the terms and conditions related to that transportation”); *Burlington N. R.R. Co. v. ICC*, 679 F.2d 934, 941 (D.C. Cir. 1982) (“the ‘exclusive remedy for any alleged breach’ is a court action, not an ICC proceeding”).

“The party invoking jurisdiction has the burden of proving its actual existence.” *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, No. 40131, 1990 WL 287857, at *6 (I.C.C. Sept. 14, 1990). Kellogg has invoked the Board’s jurisdiction here and therefore the burden is on Kellogg to demonstrate that the Board actually has jurisdiction. Kellogg states that “most of Kellogg’s suppliers’ traffic moves pursuant to contracts, and a smaller percentage is transported pursuant to tariff rates and terms.” Kellogg Resp. at 2. Thus, even under the most generous interpretation in Kellogg’s favor, the Board lacks jurisdiction over “most” of the rail traffic at issue in this proceeding with regard to Kellogg. The proper and exclusive remedy for the traffic that moves pursuant to contract is a court action, not a Board proceeding.⁹

The Board would potentially have jurisdiction over the “smaller percentage” of traffic at issue that is transported pursuant to common carrier tariff rates, if that were adequately shown. However, Kellogg has not provided sufficient information for the Board, or Amtrak, to determine exactly what traffic the Board has jurisdiction over that is at issue in this proceeding. Kellogg also states that it “has no direct visibility as to which of the inbound movements move pursuant to a rail transportation contract or a NSR tariff.” Kellogg Resp. at 2. This information, which was requested by the Board in its Decision, is essential for the Board to determine a threshold

⁹ The proper parties for such a court action are NS, and the shippers that contract with NS for rail service, who have so far been unnamed and uninvolved in this proceeding.

jurisdictional question. The Board should decline to grant injunctive relief, or any other relief, unless and until Kellogg, NS, or the shippers that contract with NS, provide the information necessary for the Board to determine the parameters of its jurisdiction over the traffic at issue in this proceeding. See *N. Am. Freight Car Ass’n*, NOR 42144, slip op. at 4 (ordering “[a]dditional briefing and a more developed record” where the parties did not agree on what traffic at issue constituted contract or common carrier tariff traffic).

IV. EVEN IF THE BOARD HAS JURISDICTION, DECLARATORY RELIEF IS PREMATURE AND UNWARRANTED

Even if Section 11101 applied to Amtrak, Kellogg’s request for declaratory relief is premature and unwarranted. Kellogg seeks a Board order “declaring that Amtrak’s choice of equipment and methods for its track project that it knows will completely shut down all freight service ... for an extended period of time constitutes a *per se* violation of 49 U.S.C. § 11101(a).” Pet. at 5; Kellogg Pet. at 1 (adopting Petitioners’ request for declaratory relief). Kellogg has failed to support this request for relief.

It is well established that a declaratory order should not issue when a dispute is not “ripe[.],” meaning a declaratory order is not “necessary to terminate an active controversy.” *Delegation of Auth.—Declaratory Ord. Proceedings*, 5 I.C.C.2d 675, 676 (1989). In *Chicago Union Station*, for example, the parties were negotiating a trackage rights agreement. The Board held that because “the parties [were] not at, and may never reach, an impasse,” a declaratory order would be “premature.” FD 36171, slip op. at 4. The Board further noted that it would be “appropriate for the Board to refrain from intervening in the parties’ negotiations at this juncture,” and, accordingly, denied the petition for declaratory relief. *Id.* Delaying a decision so that the parties can attempt to resolve potential issues is also “consistent with the Board’s preference for private-sector negotiation and resolution of disputes[.]” *Ashbro, Inc.—Petition for Declaratory Order—Wilson*

Spur Track in Denham Springs, LA, FD 35171, slip op. at 1 (S.T.B. served Nov. 9, 2009). Until such time as the parties reach an impasse, expending Board resources to evaluate and address the parties' arguments in a declaratory order would be imprudent. *See Intercity Transp. Co. v. United States*, 737 F.2d 103, 108-09 (D.C. Cir. 1984) (upholding the Commission's decision not to grant declaratory relief).

Those same circumstances apply here. As Kellogg informed the Board, Amtrak's rehabilitation work on the Subject Line is not scheduled to impact Kellogg until July 25, 2023. In the nearly two-month period before Amtrak's planned work could present an issue, Amtrak is hopeful that the parties can reach a negotiated resolution, just as Amtrak did with the original Petitioners in a much more condensed timeframe. Accordingly, Kellogg's request for declaratory relief should, at a minimum, be held in abeyance pending an update from the parties on efforts to resolve this matter.

If the Board reaches the merits, it should deny the request for a declaratory order. Kellogg asks the Board to find a "*per se* violation of 49 U.S.C. § 11101(a)," but cannot offer a single authority in support of that request. Likewise, Amtrak has not located any case in which the Board ever has found a "*per se*" violation of 11101(a). This is unsurprising: It is well established that the common carrier obligation "is not absolute," and that the Board's determination of whether a temporary suspension of rail service is reasonable "is a fact-specific inquiry to be determined on a case-by-case basis." *Bar Ale, Inc. v. Cal. N. R.R. Co.*, FD 32821, slip op. at 7 (S.T.B. served July 20, 2001); *see also Decatur Cnty. Comm'rs v. Surface Transp. Bd.*, 308 F.3d 710, 715 (7th Cir. 2002) (citation omitted). For the reasons explained in Amtrak's May 1 filing, Amtrak's total track replacement is necessary to ensure the continued safety and reliability of Amtrak's rail infrastructure, and will deliver important benefits to passenger rail, freight rail, and freight

customers. Amtrak's workplan was developed to minimize overall impact to all constituencies, to make efficient use of existing resources, and to address several technical challenges, including those associated with executing a complete replacement of wood with concrete ties, with maintaining overhead catenary for the existing passenger rail line, and with performing work on a track segment that does not have adequate track space available nearby to store work equipment.¹⁰ Accordingly, if the Board were to issue any declaratory order, it should declare that Amtrak's work is fully consistent with Amtrak's statutory obligations.

V. EVEN IF THE BOARD HAS JURISDICTION, INJUNCTIVE RELIEF IS PREMATURE AND UNWARRANTED

Kellogg asks the Board to enjoin Amtrak from carrying out its long-planned and important renewal of the Subject Line until the Board "approves a freight rail service plan filed by Amtrak and NSR that preserves service to the Petitioners on the same terms with the same frequency as such service is provided today." Pet. at 12. Because preliminary injunctions are an "extraordinary remedy," they "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 210 (D.D.C. 2012) (quoting *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)); see also *City of Fishers, City of Noblesville, & Hamilton County, Ind. – Petition for Partial Revocation of Exemption*, FD 36137, slip op. at 7 (S.T.B. served July 31, 2019). The "party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports granting the preliminary

¹⁰ Amtrak intends to expand on these and other issues in its forthcoming response to the NS Response on proposed alternatives to the existing workplan. See *supra* n.2.

injunction.” *City of Fishers*, FD 36137, slip op. at 6-7 (collecting cases). For the reasons set out below, Kellogg cannot meet its burden of persuasion on any of these elements, and the request for injunctive relief should be denied. At a minimum, the Board should defer any ruling on the preliminary injunction so the parties can explore resolution of the issues presented in Kellogg’s Petition.

1. Kellogg has not met its burden to show likelihood of success on the merits of a Section 11101(a) claim

As explained above, Petitioners are unlikely to succeed on the merits of their Section 11101(a) claim because the Board lacks jurisdiction to hear it. *See supra* Part II. But even if the Board were to entertain the merits of Petitioners’ claim under Section 11101(a), and even assuming that Amtrak is a common carrier subject to the statute, Kellogg would be unable to establish a likelihood of success on the merits. Kellogg cannot establish a “per se” violation of Section 11101(a). *See supra* Part IV; *accord* Amtrak Resp. at 13. The temporary disruption of freight rail service that will occur when Amtrak renews track on the Subject Line is reasonable under the circumstances. *See* Amtrak Resp. at 13-16. As a result, planned rehabilitation of the Subject Line does not violate Section 11101(a).

In its May 23, 2023 Response, NS argues that the temporary disruption at issue is not reasonable under the circumstances. Most of its claims turn on the purported existence of reasonable alternatives to the existing workplan. Amtrak engineers are reviewing the alternatives proposed by NS. However, it is already apparent that the viability of proposed alternatives rests on opinion testimony from individuals who lack specific knowledge of the facts and circumstances of Amtrak’s workplan. Amtrak intends to address those and other issues in its forthcoming response to the NS Response.

Other critiques advanced in the NS Response also lack merit. For example, NS takes issue with the asserted failure “to accommodate in any way affected shippers on the line.” NS Resp. at 20. On the contrary, Amtrak has consistently endeavored to obtain information from stakeholders to aid in planning for this track work. Amtrak opened discussions with NS about the total track replacement nearly nine months ago. Amtrak Reply at 6, *Verrelle V.S.* ¶ 14. In subsequent months, Amtrak’s engineering team met bi-weekly with appropriate NS personnel about the nature of the rehabilitation work, anticipated disruptions to freight service, and the scheduling details required to discuss alternative arrangements and ensure the continuity of freight customer operations. *Verrelle V.S.* ¶ 14. At no point during those discussions did NS propose any alternative workplans to Amtrak engineers. *Id.* ¶ 13. Nor did NS put Amtrak in direct contact with their shippers or freight customers to discuss their needs and potential accommodations. *Blair V.S.* ¶ 4-5. Moreover, immediately following NS’s May 1 filing mentioning proposed “alternative” workplans, Amtrak asked NS to share those plans so as to facilitate discussions between the parties, but NS declined to do so. Rather than collaborating with Amtrak to find productive solutions, NS pursued a litigation strategy, withholding its proposals and declarations until the date ordered by the Board. Amtrak has nonetheless worked closely with affected freight customers on an expedited schedule, which has already resulted in a settlement with the two Petitioners who originally brought this case.

NS next asserts that Amtrak is refusing to provide service “merely because it is inconvenient or unprofitable.” NS Resp. at 18. Not so. Amtrak programmed this important rehabilitation work after its engineering team identified the need for track renewal. The rehabilitation work that Amtrak subsequently programmed is necessary to the continued safety of the railroad, for both passenger and freight trains that operate along the track, and for the

communities that it serves. Verrelle V.S. ¶ 3. As Amtrak has previously explained, the work will also deliver other important benefits to passenger rail, freight rail, and freight customers, for example, by reducing future outages due to planned and unplanned maintenance requirements, reducing the need for speed restrictions, and delivering other benefits that will help Amtrak effectuate its statutory mandate to provide safe and reliable intercity passenger rail transportation. Amtrak Reply at 4. When—in March of 2023—NS requested that Amtrak consider a different *service* plan that would reduce the length of service disruptions, Amtrak evaluated that request carefully. Blair V.S. ¶¶ 9-10; Verrelle V.S. ¶ 10. However, after consultation and detailed study involving multiple personnel from Amtrak’s IMCS, CAPD, and Host Railroads Group, Amtrak determined that the most practical operational alternative would not only impose significant additional costs on taxpayers, but also fail to safely achieve the requested service plan. Blair V.S. ¶ 10; Verrelle V.S. ¶¶ 16-17. In other words, Amtrak elected to proceed with its original workplan not because identified alternatives were inconvenient or unprofitable, but because those alternatives presented concerns about safety and burden on the taxpaying public,¹¹ without achieving the desired result for freight customers.

Finally, NS takes aim at the length of the service disruption that Kellogg will experience because of the total track renewal. NS Resp. at 17. Amtrak understands the concerns of freight customers and is continuing to attempt to address them. Nonetheless, NS overlooks the burdens that it routinely places upon *Amtrak* when performing track work. As just one example, for a total of *seven weeks* between January and February of 2022, NS imposed its annual trackwork maintenance outage on Amtrak. As a result, *fifty-six* Amtrak Crescent Trains were able to run

¹¹ NS also asserts, based on the testimony of individuals who lack specific knowledge of the facts and circumstances driving the track renewal project, or the actual workplan, that its proposed alternatives are *more* efficient than the existing approach. See, e.g., NS Resp. at 18. That assertion is not consistent with Amtrak’s experience and Amtrak will address it in responding to NS’s Supplemental Submission.

from New York to Atlanta only, with passenger service between Atlanta and New Orleans totally unavailable for those trains due to NS trackwork. No alternate arrangements were provided by NS, which imposes this disruption on Amtrak *every year*.

Put simply, Amtrak's temporary suspension of rail service to accomplish important track renewal work is reasonable. Likewise, Amtrak has chosen a reasonable method to accomplish total track replacement under the circumstances, particularly given that the work requires replacing 100% of wooden ties with concrete ties, while also conducting a 100% replacement of the rail and ballast, all for a passenger line that runs overhead catenary and does not have adequate track space available nearby to store work equipment. From the outset of this project, Amtrak has been committed to addressing the concerns of freight customers. Now that it has a direct line to freight customers, it will continue seeking to do so promptly.

2. The important rehabilitation work at issue will not impose irreparable harm

Amtrak recognizes that rehabilitation of the Subject Line will have an impact on Kellogg and remains committed to working with NS and Kellogg to moderate that impact. As Kellogg has acknowledged, rehabilitation work impacting its Lancaster Facility has not begun. Kellogg Resp. at 3. In fact, rehabilitation work is not expected to affect freight operations to the Lancaster Facility until July 25, 2023. When rehabilitation work eventually does affect freight service to the Lancaster Facility, Kellogg will not experience immediate irreparable harm. That is because Kellogg has taken steps to pre-build inventory of {{ }} of raw ingredients, rescheduled planned maintenance downtime to occur during the disruption, and arranged for additional in-bound ingredients transportation via trucks. Brice Decl. ¶ 8. Indeed, Kellogg {{ }}.

For these reasons, Kellogg has not alleged any imminent irreparable harm, its petition for injunctive relief is premature, and the Board should, at the very least, defer ruling on the request for injunctive relief to provide the parties with further opportunity to explore a negotiated resolution. *National Min. Ass’n v. Jackson*, 768 F. Supp. 2d 34, 50 (D.D.C. 2011) (“Proving irreparable injury is a considerable burden, requiring proof that the movant’s injury is certain, great and actual—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm.”) (internal quotations marks and citations omitted).

Even if the Board entertains the request for a preliminary injunction now, Kellogg has not sufficiently alleged irreparable harm. Kellogg first states that it will be harmed because the track rehabilitation work will result in {{

}}. It is not clear whether the {{

}}.¹² In any event, even if Kellogg is ultimately harmed by the {{}}, that loss is economic and not irreparable.¹³ See *Union Pac. R.R.—Petition for Declaratory Ord. & Preliminary Injunction*, FD 36197, slip op. at 4 (S.T.B. served June 29, 2018) (noting that the Board has consistently held that monetary or economic loss by itself does not constitute irreparable

¹² There is a lack of clarity because {{

}}. See Brice Decl. ¶¶ 8-9.

¹³ Kellogg itself acknowledges, by incorporating Petitioners’ arguments, that economic losses alone are insufficient. See Pet. at 13 (acknowledging that economic losses must be substantial *and unredressable* under irreparable harm analysis).

harm); *see also* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (2013) (citing cases).

Next, Kellogg asserts that it will suffer irreparable harm {{
}}. These assertions are also insufficient
to establish irreparable harm, for two reasons. First, {{

}} *See* Amtrak Reply at 16-19 (addressing appropriate showing for economic harms).

Second, Kellogg's claims regarding {{

}}. *See* Amtrak Reply at 18-19 (noting that speculative harms are insufficient to carry Petitioners' burden).

Finally, Kellogg asserts that it will be irreparably harmed because {{

}},

Kellogg’s assertions are too speculative and vague to satisfy its burden to establish irreparable harm.¹⁴ *Cardinal Health*, 846 F. Supp. 2d at 213; 11A Wright et al., *supra*, § 2948.1 (“Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.” (footnote omitted)).

Amtrak reiterates that it is committed to working with Kellogg to mitigate the impact of the project on Kellogg and its operations. Concurrent with its ongoing review of alternative workplans proposed in the NS Response, Amtrak is evaluating whether it can identify any additional modifications to its workplan that could significantly mitigate any impacts on Kellogg. In these circumstances, a finding of irreparable harm would, at the very least, be premature.

3. Amtrak will be substantially harmed by a preliminary injunction

In contrast, enjoining rehabilitation of the Subject Line would impose substantial harms on Amtrak. First, enjoining planned rehabilitation on the Subject Line will result in significant and immediate additional expense to Amtrak, which has already invested more than \$14 million in

¹⁴ Kellogg does not argue that {{

}}.

preparation for this project, as well as to the taxpayers. Amtrak Reply at 19, Verrelle V.S. ¶ 7. The track work has already begun on the Subject Line (though it will not impact Kellogg for another two months), and an injunction would mean idling the 120-person work crew that is already on site and working. It could also require that Amtrak incur expense to recover materials. Second, enjoining rehabilitation on the Subject Line will delay Amtrak's ability to bring the Subject Line to a state of good repair, which is necessary for the continuing safety of operations on the line, and the quality and reliability of service. Amtrak Reply at 19, Verrelle V.S. ¶ 3. Third, enjoining rehabilitation on the Subject Line will have cascading effects for other planned rehabilitation projects, and impact the five-year plan for Amtrak's rail infrastructure projects. *Id.*, Verrelle V.S. ¶ 17. For example, Amtrak has only one Track Laying Machine ("TLM"), and mobilizing it requires a considerable amount of advanced planning and material placement. The TLM is already cut into the Harrisburg Line and, in the event of delay, Amtrak cannot easily redeploy the TLM from one location to another. *Id.*, Verrelle V.S. ¶ 10.

All of these harms could be compounded dramatically in this case, because Kellogg appears to seek an injunction that would prohibit Amtrak from moving forward *at all* with its track work—at least, until Amtrak and NS develop a plan that would provide Kellogg with continuous rail service throughout the project, on the same terms and with the same frequency as such service is provided today. While Amtrak is hopeful that it can find an amicable resolution to the issues presented by the Kellogg Petition, Amtrak was not, after careful and detailed study, able to identify any workable way to deploy the TLM and Undercutter without disrupting at least some amount of freight service to Kellogg. And as explained above, it is already apparent that the alternatives proposed in the NS Response rest on opinion testimony from individuals who lack specific knowledge of the facts and circumstances extant on the rail line and surrounding Amtrak's

workplan. Accordingly, granting an injunction prohibiting any disruption of service could jeopardize a \$167 million project, in preparation for which Amtrak has already invested more than \$14 million.

4. The public interest favors permitting this rehabilitation work to proceed

As Amtrak has previously explained, the public interest weighs in favor of permitting Amtrak to conduct this important rehabilitation work, for several reasons. First, ensuring that track is maintained in a state of good repair is essential to the traveling public and necessary for Amtrak to further the public interest in safe, efficient, and effective intercity passenger rail service. Second, ensuring that track is maintained in a state of good repair is important to maintaining the operational fluidity of the line and, therefore, also ultimately benefits NS and freight customers like Kellogg. Third, delaying rehabilitation of the Subject Line will have cascading effects for Amtrak’s other scheduled infrastructure work that is intended to advance the interests of passenger and freight operations. Finally, delaying this important work (or, worse, granting an injunction that in effect prohibits it) will impose considerable costs on the taxpaying public.¹⁵

In sum, Kellogg’s request for injunctive relief should be denied. In the alternative, the Board should find the request premature and defer action on it pending further information from the parties on their efforts to reach an amicable resolution.

¹⁵ Kellogg apparently means to incorporate Petitioners’ arguments to satisfy its burden on this element. Some of those incorporated arguments turn on specific claims about Petitioners’ operations and therefore cannot aid Kellogg in satisfying its burden. Other incorporated arguments are speculative or lack merit. For example, Petitioners argue that this situation will recur and will affect other shippers or freight customers. However, the magnitude of the impact on shippers and freight customers on this line is in large part due to the uniquely long distance—over fifteen miles—between the interlockings where the track must be taken out of service for the work to be performed. In any event, Petitioners’ speculative claims about future disruptions cannot satisfy their burden, because the challenges presented by any particular service disruption must be evaluated in context, accounting for the needs of affected parties and the actions taken or available to accommodate them. *Cardinal Health*, 846 F. Supp. 2d at 213 (emphasizing that harms must be “concrete and corroborated, not merely speculative”); (internal quotation marks omitted)); 11A Wright et al., *supra*, § 2948.1 (“Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.” (footnote omitted)).

VI. THE REQUEST FOR A DIRECTED SERVICE ORDER SHOULD BE DENIED

As an alternative to their request for injunctive relief, Kellogg adopts Petitioners' suggestion that the Board issue a directed service order pursuant to Section 11123 to "preserve the status quo for at least 30 days." Pet. at 17. But the status quo will already be preserved with respect to service to Kellogg until July 25, 2023, and a directed service order is therefore unnecessary. A directed service order in this case would be both inconsistent with congressional intent under the pertinent statute and premature, given the parties' imminent discussions to resolve this issue before any disruptions to Kellogg occur two months from now. For those reasons, as discussed below, a directed service order should be denied or, at minimum, deferred.

As described in Amtrak's May 1, 2023 response, the issuance of a directed service order against Amtrak in its capacity as a rail line owner would be a novel and inapt use of the Board's powers under Section 11123, especially in view of the Board's limited powers over Amtrak. *See supra* Part II. In enacting the predecessor to Section 11123, Congress did not intend to give the Board a "general grant of emergency power." *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 494 (7th Cir. 1980) (quoting *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528, 534-35 (1924)). Rather, Congress had specific concerns in mind when it amended the statute to provide for a directed service order in the event of a "failure of existing commuter rail passenger transportation operations caused by a cessation of service by the National Railroad Passenger Corporation." 49 U.S.C. § 11123(a). As 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). The Board must interpret the plain text of this statute “in light of the purposes Congress sought to serve.” *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 608 (1979).

Kellogg argues that the situation contemplated by Congress actually “does apply here” because “the track project will entail Amtrak ceasing to provide passenger service over the main line to which Kellogg’s Lancaster Facility is connected.” Kellogg Resp. at 11 (emphasis omitted). But Amtrak is still providing passenger service on the adjacent track, and in any event, this situation plainly is not what Congress had in mind. Given the levels of funding and the precarious financial situation of Amtrak at the time of the statutory amendments, Congress was contemplating the availability of a directed service order in the event “Amtrak should cease operation” entirely. H.R. Rep. No. 108-243 at 99, 263 (2003). The idea was that the Board would be able to direct action and funds to continue commuter and freight operations on the Northeast Corridor should Amtrak falter. There is nothing to indicate that Congress intended to give the Board a broad grant of power that would prevent Amtrak from making necessary rail improvements on track that Amtrak owns. *See* 49 U.S.C. § 24301(c).

Even accepting Kellogg’s premise, issuing such an order would be premature, as there is no “emergency situation” at this time. 49 U.S.C. § 11123(a). The title of Section 11123 refers to “[s]ituations requiring **immediate action** to serve the public.” (Emphasis added.) Because this statute gives the Board “unusual, drastic, and in some respects dictatorial powers,” courts have found that “[p]owers of such character ... can and should be exercised only on the basis that they are necessary to meet an emergency.” *United States v. Thompson*, 58 F. Supp. 213, 216 (E.D. Mo. 1944). A directed service order is not necessary at this time, as there is no emergency, and Amtrak is hopeful that the parties will be able to expeditiously negotiate a resolution without Board intervention. *See Foster Poultry Farms –Ex Parte Petition for Emergency Service Ord.*, FD

36609, slip op. at 4 (S.T.B. served Dec. 30, 2022) (Board Member Schultz noting, in dissent, that the Board’s decision to issue a directed service order in that case was “not necessary at [the] time and appear[ed] to be without legal authority”). The expected service disruption to Kellogg is not until July 25, 2023, as Kellogg itself recognizes. Thus, at a minimum, the Board should hold the request for a directed service order in abeyance.¹⁶

Issuance of a directed service order would also raise novel issues requiring the Board to determine issues of funding and operational capabilities under Section 11123(c)(4), as well as the reimbursement of Amtrak for its costs under Section 11123(b)(3)(B). While Kellogg baldly asserts that Section 11123’s provisions “governing reimbursement of costs and indemnification would be inapplicable,” Kellogg Resp. at 12 n.37, Kellogg cites no authority for that assertion. Nor is there any such authority, as a directed service order in these wholly inapt circumstances would be unprecedented. Kellogg confirms this conclusion when it argues that with “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.” Kellogg Resp. at 12. Nothing in Section 11123 appears to contemplate this convoluted path of an order directed at Amtrak, but premised on NS’s continuing operations.

Moreover, for the same reasons that the Board should not issue declaratory relief at this point, the Board should delay any decision on a directed service order. These reasons include the preference for private-sector negotiations, the conservation of agency resources, and the avoidance of unnecessarily deciding complex legal questions. *See supra* Part IV. Given that the parties may be able to come to a resolution well before Kellogg experiences any service disruption, a directed

¹⁶ Additionally, as set forth above, the Board should decline to enter any orders regarding rail service provided to Kellogg before verifying what transportation at issue moves pursuant to common carrier, rather than contractual, obligations. *See supra* Part III.

service order at this point is unnecessary. At a minimum, then, the Board should defer a decision pending an update from the parties regarding their efforts to negotiate a resolution.

CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Board deny the request for a preliminary injunction, declaratory order, and directed service order. In the alternative, the Board should defer action on the requested relief pending further updates from the parties about their efforts to resolve this dispute.

Respectfully submitted,

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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 email on the service list to Finance Docket No. 36695.

May 30, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

Exhibit A - Withheld as Containing Highly Confidential Information