

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36496

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER  
49 U.S.C. § 24308(e)—CSX TRANSPORTATION, INC., AND NORFOLK SOUTHERN  
RAILWAY COMPANY

Digest:<sup>1</sup> This decision rules on outstanding matters in a motion to compel filed by the National Railroad Passenger Corporation and rules on certain other outstanding matters in this proceeding.

Decided: July 22, 2022

BACKGROUND

At the conclusion of the May 12, 2022 session of the evidentiary hearing in this case, the Board discussed a number of evidentiary issues, invited the Parties<sup>2</sup> to submit additional evidence on those issues, and indicated that the hearing record would remain open for that purpose. A decision served on May 17, 2022, confirmed that the hearing record would remain open, until June 13, 2022, to allow the Parties to submit any additional evidence. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496 (STB served May 17, 2022).

On May 19, 2022, Amtrak filed a motion requesting that the Board order CSXT and NSR to redesignate all of the materials produced in connection with the 2020 and 2021 Rail Traffic Controller (RTC) studies from “highly confidential” to “confidential,” so that Amtrak personnel could work with Amtrak’s outside consultants to submit additional RTC modeling. (Amtrak Mot. 1, May 19, 2022.) In the alternative, Amtrak requested that the Board modify the protective order served on April 14, 2021, to allow certain Amtrak personnel to access this highly confidential material after signing the highly confidential undertaking pursuant to the protective order. (Amtrak Mot. 1, May 19, 2022.) In addition, Amtrak requested that the Board

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The Parties are the National Railroad Passenger Corporation (Amtrak), CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), and the Alabama State Port Authority and its rail carrier division, the Terminal Railway Alabama State Docks (collectively, the Port).

order CSXT and NSR to produce the additional RTC analyses that, during the hearing on the record, Mark Dingler testified he had performed, together with all supporting workpapers. (Id.) CSXT and NSR opposed Amtrak's motion. (See CSXT & NSR Reply, May 31, 2022.)

Also on May 19, 2022, CSXT, NSR, and the Port filed a renewed motion for Board-sponsored mediation and stay, technical conference, and, in the alternative, an extension of time for filing supplemental evidence, to which Amtrak replied on May 20, 2022.

On May 23, 2022, Amtrak filed a motion to compel CSXT and NSR to produce information requested in Amtrak's supplemental interrogatories to CSXT and NSR, attached as Exhibits A and B, respectively, to Amtrak's motion. (Amtrak Mot. to Compel 1, May 23, 2022.) According to Amtrak, the supplemental interrogatories were necessitated by the Board's inquiries into additional evidence at the conclusion of the hearing on May 12, 2022. (Id.)

On May 31, 2022, CSXT and NSR replied to the motion to compel, arguing that the motion is untimely, the supplemental interrogatories are beyond the proper scope of supplemental discovery, and Amtrak has failed to articulate why the interrogatories are reasonably likely to result in information relevant to the core concerns raised by the Board at the hearing on May 12, 2022. (CSXT & NSR Reply Mot. to Compel 1-2, May 31, 2022.)

By decision served June 10, 2022, the Board modified the protective order in this proceeding to allow certain Amtrak personnel to access select materials designated as "highly confidential," provided those Amtrak personnel sign the undertaking for "highly confidential" material. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496, slip op. at 2 (STB served June 10, 2022). The Board also ordered the Parties to participate in Board-sponsored mediation but ruled that it would not hold the proceeding in abeyance during the pendency of the mediation, and extended the deadline for filing supplemental evidence to July 13, 2022. Id. at 5. In addition, the Board noted that it would address the remaining matters in the outstanding motions in a subsequent decision. Id.

On June 24, 2022, CSXT and NSR filed a status report on their discussions with Amtrak regarding the supplemental interrogatories and explained that CSXT and NSR have each agreed to produce certain information and documents to Amtrak. (CSXT & NSR Status Report 1, June 24, 2022.) By decision served July 1, 2022, CSXT, NSR, and Amtrak were directed to file a joint status report, or separate status reports, identifying, among other things, any outstanding discovery requests from the motion to compel or from the motion for redesignation that still require Board resolution. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496, slip op. at 2 (STB served July 1, 2022).

On July 6, 2022, CSXT, NSR, and Amtrak each filed separate status reports. On July 11, 2022, CSXT and NSR filed a response to Amtrak's July 6, 2022 status report. By decision served July 11, 2022, the deadline for filing supplemental evidence was extended to July 27, 2022. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496, slip op. at 1 (STB served July 11, 2022).

## DISCUSSION AND CONCLUSIONS

The status reports filed on July 6, 2022, indicate that the discussions among CSXT, NSR, and Amtrak have narrowed considerably the outstanding discovery disputes in this proceeding. The Board appreciates the efforts of CSXT, NSR, and Amtrak to resolve these discovery disputes among themselves. In this decision, the Board will rule on the outstanding discovery disputes identified in the status reports, as well as other outstanding matters in this proceeding.

Motion to Compel

In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat’l Ry., FD 35743, slip op. at 8 (STB served Sept. 23, 2014). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.

Timeliness of the Motion to Compel

CSXT and NSR argue that Amtrak’s motion to compel is untimely, noting that discovery closed on October 4, 2021, and that reopening discovery would unnecessarily delay resolution of this matter. (CSXT & NSR Reply Mot. to Compel 2-3, May 31, 2022.) CSXT and NSR argue that nothing in the Board’s comments at the hearing on May 12, 2022, or in the Board’s May 17, 2022 decision, suggested that the Board intended to reopen discovery. (Id. at 4.) CSXT and NSR argue that, if Amtrak is allowed additional discovery, they would insist on the opportunity to respond and take additional discovery, which would take this case back to square one. (Id. at 7.)<sup>3</sup>

The Board finds that limited additional discovery is warranted in this proceeding because of the evidentiary issues raised by the Board at the hearing on May 12, 2022 (and need not decide if there might be any other basis for allowing additional discovery). The status report filed on June 24, 2022, and status reports filed on July 6, 2022, demonstrate that the Parties have agreed among themselves to engage in additional discovery. While additional discovery will further delay the resolution of this proceeding, in light of the concerns about the inadequacies of the evidence adduced thus far, as discussed by the Board at the conclusion of the May 12 session, additional discovery and evidence are warranted in order to facilitate the Board’s resolution of the case.

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<sup>3</sup> To date, there is no indication that CSXT and NSR have sought additional discovery from Amtrak, nor have they indicated what additional discovery they might need from Amtrak.

Supplemental Interrogatory No. 3 to NSR

In Supplemental Interrogatory No. 3 to NSR, Amtrak requested that NSR provide 21 items of information for each of its subdivisions over which Amtrak operated service during all or any part of September through November 2019. Amtrak states that NSR refused to provide the information for all subdivisions, but, after several meet-and-confers, Amtrak and NSR agreed that each would choose three segments it thought were comparable to the Back Belt, and NSR would answer Supplemental Interrogatory No. 3 with regard to those six segments. (Amtrak Status Report 2-3, July 6, 2022.) According to Amtrak, NSR informed Amtrak that it would not be able to answer subparts (s)-(u) of Supplemental Interrogatory No. 3 for those six segments, which requested that NSR provide average minutes of freight delay per 100 miles, average freight train speed, and average number of reworks, all to be calculated according to the same methodology applied in the 2021 RTC Study. (Id. at 3.) Amtrak states that NSR provided only average freight train speed for those six segments, and the methodology used was different than the 2021 RTC Study. (Id.) Amtrak further states that NSR refused to provide average freight train speed for the Back Belt according to the same methodology as the other six segments. (Id.) Therefore, Amtrak requests that the Board order NSR to provide average freight train speed for the Back Belt calculated according to the same methodology NSR used for the other six segments. (Id.)<sup>4</sup>

In its status report, NSR states that Amtrak has access to the OS data, and Amtrak's experts can analyze that data and calculate NSR speed and other metrics over the Gulf Coast corridor. (NSR Status Report 2, July 6, 2022.) NSR argues that it should not have to perform another special study of the Gulf Coast corridor using the methodology and metrics preferred by Amtrak. (Id.)

The Board will deny Amtrak's request to compel NSR to provide the average freight train speed for the Back Belt calculated according to the methodology that NSR used to calculate average freight train speed for the six segments chosen by NSR and Amtrak. It appears that Amtrak already has access to the underlying data for the Back Belt from which its experts could calculate the average freight train speed, which would allow for a comparison of average freight train speed on the Back Belt to average freight train speed on other NSR lines on which Amtrak operates.

Supplemental Interrogatory No. 6 to CSXT

In Supplemental Interrogatory No. 6 to CSXT, Amtrak requested that CSXT identify all customers on the Gulf Coast Route and, for each customer, identify separately the following:

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<sup>4</sup> According to Amtrak, based on NSR's refusal to provide this information, Amtrak reserves the right to request that the Board draw an adverse inference that, following restoration of Gulf Coast service, there will be no impact on average freight train speed for NSR on the Back Belt. (Amtrak Status Report 4 n.2, July 6, 2022.) The Board will deny this request as well, because, as stated in the text, Amtrak will be able perform its own calculations of freight train speed.

- a. Contact information
- b. Any timing requirements for pick-up or delivery of cars
- c. Scheduled weekly switching days and times
- d. Weekly percentage of cars delivered to each customer within four hours of the original estimated time of arrival for 2019, 2020, 2021, and 2022.

(Amtrak Mot. to Compel, Ex. A at 6.)

According to Amtrak, CSXT stated that it would not produce customer service metrics because CSXT was unable to identify a complete data set of customer service metrics that it considered “useful, reliable, and producible.” (Amtrak Status Report 4, July 6, 2022; see also CSXT Status Report 3, July 6, 2022.) Amtrak requests that the Board bar CSXT from offering, citing, or otherwise relying on any new data or information about how restoration of Amtrak’s Gulf Coast service will impact customers on the Gulf Coast line, given that CSXT has not produced customer service evidence to Amtrak. (Amtrak Status Report 4, July 6, 2022.)

CSXT states that it has already provided to Amtrak performance metrics for all subdivisions over which Amtrak operates, and it produced complete OS data to Amtrak and it has produced all data on which it may rely to demonstrate the impact of Amtrak service on CSXT customers. (CSXT Status Report 5, July 6, 2022.) According to CSXT, Interrogatory No. 6 would require it to perform a special study, which would be improper. (Id.) Furthermore, according to CSXT and NSR, CSXT has repeatedly stated that it would “not rely on any data that had not been produced to Amtrak or previously made available in workpapers.” (CSXT & NSR Reply 3, July 11, 2022.)

The Board will deny Amtrak’s request to compel production. However, CSXT will not be permitted to use or rely on any data or information sought by Amtrak in response to Supplemental Interrogatory No. 6 that has not been produced or otherwise already been made available to Amtrak.

#### Other Matters

##### *Amtrak Request for Additional RTC Analyses Performed by Mr. Dingler*

In its May 19, 2022 motion, Amtrak requested that CSXT and NSR produce the additional RTC analyses that Mr. Dingler testified he had performed. (See Amtrak Mot. 1, May 19, 2022.) CSXT and NSR argue that Amtrak is improperly seeking discovery of expert reports and workpapers that are protected by the work product doctrine. (CSXT & NSR Reply 2, May 31, 2022.) In addition, CSXT and NSR argue that they should have the opportunity to submit the additional RTC analyses as part of their own supplemental evidence, if they so choose. (Id. at 2-3.)

In its July 6, 2022 status report, Amtrak reiterates its request for the additional RTC analyses. (Amtrak Status Report 5, July 6, 2022.) Amtrak requests that the Board either order

CSXT and NSR to produce these materials to Amtrak or bar CSXT and NSR from relying on them. (Id.)

The Board will deny Amtrak's request for the additional RTC analyses because the materials are protected by the work product doctrine. See Fed. R. Civ. P. 26(b)(4)(B) (protecting from discovery draft expert reports and disclosures required under Rule 26(b)(2)); see also Yeda Rsch. & Dev. Co. v. Abbott GmbH & Co. KG, 292 F.R.D. 97, 106 (D.D.C. 2013) (noting that drafts of testifying expert reports are shielded from disclosure, as are communications between the party's attorney and a testifying expert, with some exceptions). The Board will also deny Amtrak's request to bar CSXT and NSR from relying on the additional RTC analyses. However, CSXT and NSR will be barred from relying on the additional RTC analyses unless such materials are produced to Amtrak no later than July 27, 2022.

#### Renewed Request for a Technical Conference

As part of their May 19, 2022 motion, CSXT, NSR, and the Port renewed their request to hold a technical conference with their experts and Board staff. (CSXT, NSR, & Port Mot. 4, May 19, 2022.) According to CSXT, NSR, and the Port, a technical conference would allow the Parties and Board staff to pose specific questions on the RTC modeling. (Id.)

The Board will deny the renewed request to hold a technical conference at this time. If additional hearing dates are necessary in light of any supplemental evidence that is filed, the Parties and the Board members will have an opportunity to pose additional questions about RTC modeling to the Parties' experts.

#### Further Requests for Extensions of Time

Also in their May 19, 2022 motion, CSXT, NSR, and the Port noted that there are certain dates in July on which counsel or experts will be unavailable for further hearing sessions because of planned travel. (See CSXT, NSR, & Port Mot. 3 & n.3, May 19, 2022.) CSXT, NSR, and the Port also asked the Board to extend the June 30 deadline originally set for the submission of supplemental evidence, due to the unavailability of certain of CSXT's and NSR's RTC modeling experts. (Id. at 3.) Although these particular requests are now moot, as the Board does not anticipate hearings in July and as it has now twice extended the date for filing supplemental evidence, the Board notes that any future requests for extension of time, by any Party, because of the unavailability of key personnel must be supported by verified statements specifying the reasons for the unavailability.

#### It is ordered:

1. The remaining requests from Amtrak's motion to compel are denied, as discussed above.
2. Amtrak's request for additional RTC analyses performed by Mr. Dingler is denied.

3. CSXT and NSR will be barred from relying on the additional RTC analyses performed by Mr. Dingler unless those materials are produced to Amtrak by July 27, 2022, as discussed above.

4. CSXT, NSR, and the Port's renewed request for a technical conference is denied.

5. Any further requests for extensions of time because of the unavailability of key personnel must be supported by verified statements.

6. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.