

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36496

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

Digest:<sup>1</sup> This decision denies a motion to dismiss filed by CSX Transportation, Inc., and Norfolk Southern Railway Company, denies as moot a request for an interim order regarding track access by the National Passenger Railroad Corporation, establishes a procedural schedule, and appoints an administrative law judge to resolve all discovery disputes.

Decided: August 5, 2021

On March 16, 2021, the National Passenger Railroad Corporation (Amtrak) filed an application with the Board, pursuant to 49 U.S.C. § 24308(e), seeking an order requiring CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR)<sup>2</sup> to allow Amtrak to operate additional intercity passenger trains, consisting of two round-trips per day, over the rail lines of CSXT and NSR between New Orleans, La., and Mobile, Ala. (Gulf Coast Service), beginning on or about January 1, 2022. Amtrak requests that the Board institute a proceeding to consider Amtrak’s request for such an order and issue a procedural schedule. Amtrak also requests that the Board issue an interim order requiring CSXT and NSR to provide Amtrak with access to their rail lines between New Orleans and Mobile in order to perform all necessary preparations for Gulf Coast Service to commence.

On April 5, 2021, CSXT and NSR filed a motion to dismiss Amtrak’s application. In a decision served on April 14, 2021, the Board stated that “[t]he motion to dismiss raises threshold issues that must be addressed” and noted the April 26 deadline for Amtrak’s reply per Board rules.<sup>3</sup> On April 26, 2021, Amtrak replied to the motion to dismiss. NSR filed a surreply on April 30, 2021, and, on May 7, 2021, Amtrak responded that the surreply should be stricken from the record. On May 11, 2021, CSXT filed a surreply to Amtrak’s April 26 reply. On

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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> Although Amtrak names Norfolk Southern Corporation in its application, it appears that NSR is the proper party. (See Mot. to Dismiss 1 n.1.)

<sup>3</sup> The Board also granted the parties’ joint motion for a protective order.

May 12, 2021, Amtrak asked the Board to strike CSXT's filing.<sup>4</sup> On July 6, 2021, Amtrak filed a notice regarding Amtrak's pending request for an interim order providing it with access to the CSXT and NSR rail lines between New Orleans and Mobile. On July 9, 2021, CSXT and NSR replied to that filing.

On May 10, 2021, the U.S. Department of Transportation (USDOT) and Federal Railroad Administration (FRA) filed a letter asking the Board to act expeditiously on Amtrak's application; NSR and CSXT filed responses, respectively, on May 12, 2021, and May 13, 2021. In addition, numerous comments have been submitted.<sup>5</sup>

## BACKGROUND

Prior to August 2005, Amtrak provided long-distance passenger service three days per week in the Gulf Coast region, including between New Orleans and Mobile. (Appl. 3 & App. B, GCWG Report at App. C at C-7; see also Mot. to Dismiss 8-9.) In 2005, Hurricane Katrina caused significant damage to the rail infrastructure in the region, leading to the suspension of Amtrak's passenger rail service east of New Orleans. (Appl., App. B, GCWG Report at 1.) In 2015, Congress directed the creation of the Gulf Coast Working Group (GCWG) to, among other

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<sup>4</sup> Although, as Amtrak argues, a reply to a reply is not permitted, see 49 C.F.R. § 1104.13(c), in the interest of a complete record, the Board will accept NSR's April 30 filing and CSXT's May 11 filing as part of the record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

<sup>5</sup> U.S. Senators John Kennedy, Richard Shelby, and Roger F. Wicker each filed a letter. A letter was jointly filed by members of Alabama's delegation to the U.S. House of Representatives: Jerry L. Carl, Robert B. Aderholt, Mo Brooks, Barry Moore, Gary Palmer, Mike Rogers, and Terri Sewell. Alabama Governor Kay Ivey filed a letter. Letters and comments were filed by Alabama District Export Council, Alabama Farmers Federation, Alabama Mining Association, Alabama Railway Association, Alabama State Port Authority, APM Terminals Mobile, LLC, Mayor George L. Bass, former Mississippi Governor Phil Bryant, Business Council of Alabama, Mayor Robert H. Byrd, Jr., Coastal Mississippi, Coast Transit Authority, Councilman Joel Daves, Mayor Steve Demetropoulos, Mayor Nancy Depreo, Mayor Shea Dobson, Mayor Michael J. Favre, Mayor Andrew Gilich, Gulf Coast Business Council, Gulf Regional Planning Commission, Hancock County Chamber of Commerce, Hancock County Community Development Foundation, Hancock County Port & Harbor Commission, Mayor Billy Hewes, Jackson County Board of Supervisors, Louisiana Railroads Association, Alabama State Representative Mac McCutcheon, Mayor Leo McDermott, Mississippi Aquarium, Mississippi Municipal League, Mississippi Railroad Association, Mississippi State Port Authority, Partners for Stennis & Michoud, Virgil G. Payne, Port of Pascagoula, Mayor Rusty Quave, Rail Passengers Association, Alabama State Senator Greg J. Reed, Mayor Mike Smith, Southern Mississippi Planning and Development District, Southern Rail Commission (SRC) (signed by representatives from Louisiana and Mississippi), and Mayor Phil Torjusen. A letter was jointly filed by Board of Commissioners for the Port of New Orleans and New Orleans Public Belt Railroad Commission for the Port of New Orleans.

things, evaluate all options for restoring intercity passenger rail service in the Gulf Coast region.<sup>6</sup> Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 11304, 129 Stat. 1312, 1655 (2015). Amtrak, CSXT, and NSR participated in the group, as did representatives from FRA, SRC, the Departments of Transportation of Alabama, Florida, and Louisiana, municipalities and communities along the proposed route, regional transportation planning organizations, and others. (Appl. 3.) GCWG issued a report in 2017 recommending, as the preferred option, restoration of long-distance service between New Orleans and Orlando, and establishment of a state-supported service with one daily round trip between New Orleans and Mobile. (Id., App. B, GCWG Report at ES-1, 12-14.) The report also recommended infrastructure investments both to support the service and to enhance the reliability and reduce the trip time of passenger trains. (Id., App. B, GCWG Report 29-30.) The total cost of the recommended improvements for New Orleans-to-Mobile service was approximately \$100 million. (Id., App. B, GCWG Report 30, Table 5.) The report noted that “[t]he effectiveness of the improvements for on-time performance has not been validated as part of [the report] and [validation] is recommended as a next step.” (Id., App. B, GCWG Report 29.)

Amtrak states that CSXT and NSR “ultimately did not support the working group’s recommendations or its assessment of what was required to restore service” and that CSXT performed a separate study that concluded approximately \$2 billion in investments were necessary to restore passenger service in the Gulf Coast from New Orleans to Orlando. (Appl. 4; see also id., App. B, GCWG Report at App. A at A-5 (letter from CSXT to FRA stating that restoring Gulf Coast passenger service would require at least \$2 billion in infrastructure improvements); Mot. to Dismiss 10 (stating that CSXT conducted a 2016 study with HDR Engineering, Inc. (HDR) for the GCWG at FRA’s request).) According to CSXT and NSR, Amtrak objected to the 2016 HDR study, in part because it was conducted by CSXT alone. (Id.)

In January 2020, the parties agreed to sponsor a joint Rail Traffic Controller (RTC) study, with the resulting RTC Study Agreement stating that the study would “provide useful input for the reintroduction” of passenger service in the region. (See Amtrak Reply 7, Apr. 26, 2021.) Under their RTC Study Agreement, HDR would model operations and the infrastructure needed to support them. (See Appl. 4; Mot. to Dismiss 2.) The RTC Study Agreement was valid for one year, but the study was not completed by January 2021, and Amtrak elected not to renew the agreement. (Amtrak Reply 7, Apr. 26, 2021.) The parties dispute the usefulness of and need for the study, the reasons it has not been completed, and the amount of time it would take to complete. (See, e.g., Mot. to Dismiss 8-15; Amtrak Reply 7-12, Apr. 26, 2021.)

In February 2021, Amtrak requested that CSXT and NSR “agree to permit the Gulf Coast Service to commence on January 1, 2022, in accordance with a specific twice-daily schedule and terms proposed by Amtrak.” (Appl. 4.) Amtrak states that CSXT and NSR did not agree, prompting its application under § 24308(e). (Id.)

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<sup>6</sup> Congress authorized and appropriated funding for GCWG. (See Appl., App. B, GCWG Report at App. E at E-3 (“Through the [Fixing America’s Surface Transportation Act] Section 11101(d), USDOT through the FRA is to provide \$500,000 in both FY16 and FY17 to support the work of the GCWG under a variety of grants”). See also USDOT/FRA Letter 2 (noting FRA’s expenditure of approximately \$700,000 in support of GCWG’s work).)

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 24308(e), “[w]hen a rail carrier does not agree to provide, or allow Amtrak to provide, for the operation of additional trains over a rail line of the carrier, Amtrak may apply to the Board for an order requiring the carrier to provide or allow for the operation of the requested trains. After a hearing on the record, the Board may order the carrier, within 60 days, to provide or allow for the operation of the requested trains on a schedule based on legally permissible operating times.”<sup>7</sup> In determining whether to order the carrier to provide or allow for the operation of additional trains, the Board shall consider “whether an order would impair unreasonably freight transportation” and, “when establishing scheduled running times, the statutory goal of Amtrak to implement schedules that attain a system-wide average speed of at least 60 miles an hour that can be adhered to with a high degree of reliability and passenger comfort.” § 24308(e)(2). The carrier has “the burden of demonstrating that the additional trains will impair the freight transportation.” § 24308(e)(2)(A).

CSXT and NSR argue that the dispute is not ripe for adjudication under § 24308(e) because they have not refused Amtrak’s request to allow operation of additional trains. (Mot. to Dismiss 1-4.) They claim that refusal is required under that provision. (*Id.*) They also argue that the RTC Study should be completed before the Board considers Amtrak’s application and that Amtrak lacks state support for the Gulf Coast Service at least in part because the RTC Study has not been completed. (*Id.*) CSXT and NSR also argue that adding the infrastructure needed to support Amtrak’s two round trips per day between New Orleans and Mobile would have environmental impacts that necessitate environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12 and that the application should be dismissed because Amtrak failed to submit an environmental and historic report pursuant to 49 C.F.R. §§ 1105.7 and 1105.8. (Mot. to Dismiss 17-22.) CSXT and NSR assert that Amtrak’s request for an interim order allowing access to the relevant rail lines should be denied with prejudice, (*id.* at 22-26), or as moot given the access CSXT has granted to Amtrak and the access Amtrak already had from NSR, (CSXT & NSR Reply 2, July 9, 2021). Finally, they raise concerns about Amtrak’s proposed procedural schedule. (Mot. to Dismiss 26-27.) Amtrak replies that the proceeding is ripe for adjudication, (Amtrak Reply 4-14, Apr. 26, 2021); that environmental and historic reports are not required because Amtrak is not requesting that the Board order any infrastructure projects and thus the application does not trigger NEPA or require historic review, (*id.* at 14-17); and that the Board should issue the interim order<sup>8</sup> and adopt its proposed procedural schedule, (*id.* at 17-20).

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<sup>7</sup> The statute also provides that “if the Board decides not to hold a hearing, the Board, not later than 30 days after receiving the application, shall publish in the Federal Register the reasons for the decision not to hold the hearing.” § 24308(e).

<sup>8</sup> As discussed below, Amtrak wrote to the Board on July 6, 2021, to update it on recent discussions with CSXT and NSR regarding access to the lines. On July 9, 2021, CSXT and NSR responded that the Board should find that Amtrak’s request for an interim order is moot in light of Amtrak’s July 6 filing.

The Board, as discussed below, concludes that the proceeding is ripe for adjudication. In addition, environmental and historic reports are not needed because environmental review under NEPA and review under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108 (NHPA) are not required, as explained below. Therefore, the motion to dismiss will be denied.<sup>9</sup> The Board will also deny as moot Amtrak's request for an interim order and establish a procedural schedule.

### **Ripeness**

CSXT and NSR argue that the dispute is not ripe for adjudication under § 24308(e) because they have not refused Amtrak's request to allow operation of additional trains, as they claim is required under that provision. (Mot. to Dismiss 1-4.) They claim that before the Board considers Amtrak's application, Amtrak should be required to "live up to the commitments it made" to complete the RTC study. (*Id.* at 1.) They argue that the study is necessary to assess the infrastructure needed to support such service, particularly given the route's complicated infrastructure and important role in freight transportation and given the inconsistencies in Amtrak's statements regarding the additional infrastructure needed for the service. (*Id.* at 8, 11-12.) CSXT and NSR note that Amtrak here proposes a different, more frequent service than it previously provided and argue that the GCWG report did not consider the impact of an 80% on-time performance (OTP) standard for any two consecutive calendar quarters for passenger service. (*Id.* at 8-9 & n.22.) See also 49 U.S.C. § 24308(f)(1); Metrics & Minimum Standards for Intercity Passenger Rail Serv., 85 Fed. Reg. 72971, 73001 (Nov. 16, 2020) (codified at 49 C.F.R. pt. 273). They argue that a study is necessary to determine what infrastructure is required to meet this OTP standard without unreasonable degradation of freight rail service, as failure to meet the standard could result in a Board investigation and assessment of damages against them. (Mot. to Dismiss 9-10.)

CSXT and NSR also argue that Amtrak does not have the requisite state support for the proposed service. (*Id.* at 15-17.) They claim that the State of Alabama has indicated that the RTC study should be completed before additional trains are operated and has expressed concern that the planned passenger service would inhibit the growth of the Port of Mobile. (*Id.*; see also Letter from Governor Ivey, Apr. 1, 2021; Letter from Senator Shelby, Mar. 31, 2021.) CSXT and NSR note that Alabama, either as a possible beneficiary of state-supported service or as a constituent member of SRC, may have an obligation to support the Gulf Coast Service. (Mot. to Dismiss 16.)

Amtrak responds that, under the plain language of § 24308(e), its application is ripe for consideration by the Board because, despite years of discussions, the carriers have not agreed to allow service to resume. (Amtrak Reply 2, 5-8, Apr. 26, 2021.) Further, Amtrak claims that the statute does not require a study, and that, while it agreed to participate in the RTC study, it did not agree that such a study was a prerequisite to reinstatement of service. (*Id.* at 7.) Amtrak also argues that the statute does not require it to have unanimous political support to request a Board order; rather, Congress's intent was that the statute provide an expedited procedure. (*Id.* at 12.)

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<sup>9</sup> Given this conclusion, the Board need not address Amtrak's argument that the motion to dismiss is moot. (See Amtrak Reply 20-21, Apr. 26, 2021.)

Amtrak also argues that there is substantial political and financial support for the contemplated service. (*Id.* at 13; see also Letter from U.S. Senator Wicker, Apr. 21, 2021 (“The groundwork for successful passenger rail service has already been laid, with the [SRC] having secured approximately \$11 million in federal funding for operating costs and \$66 million in federal and local funding to make infrastructure improvements along the Gulf Coast corridor.”).)

USDOT and FRA state that FRA is committed to data-driven studies of projects that it funds but has concluded here that, despite several years of collaboration between FRA, the parties, and other stakeholders, and “the investment of significant funds, Amtrak has been unable to obtain the agreement of the host freight railroads, and there is no clear or imminent path to the restoration of this service, absent the Board’s intercession.” (USDOT/FRA Letter 1-2.) They state that the RTC Study efforts did not lead to consensus “on the sharing of relevant data inputs and model outputs, let alone the necessary scope of capital improvements” despite attempts by FRA and Amtrak to address concerns with CSXT and NSR. (*Id.* at 3.) They further state that “FRA remains concerned that it has been unable to obtain access to all the data and analysis necessary for a proper review of the issues involved in restoring service.” (*Id.*) CSXT and NSR each responded to the letter, noting their agreement regarding the importance of a study but disagreeing with the conclusion that a Board proceeding is necessary. (NSR Letter 1-2, May 12, 2021; CSXT Letter 1-2, May 13, 2021.)

A number of comments have been filed supporting completion of the RTC study before further steps are taken. (See, e.g., Letter from U.S. Senator Shelby, Mar. 31, 2021; Letter from Alabama Governor Ivey, Apr. 1, 2021.) Many other commenters, however, support Amtrak’s application. (See, e.g., Letter from U.S. Senator Wicker, Apr. 21, 2021.)

The Board concludes that the matter is ripe for adjudication. The statute’s threshold requirement that the carriers “[do] not agree to provide, or allow Amtrak to provide, for the operation of additional trains” has been met. See § 24308(e).<sup>10</sup> In February 2021, Amtrak requested that the carriers allow twice-daily service, and the carriers have not agreed to that request. (Appl. 4.) Further, for several years, Amtrak has sought to restore service in some manner on the Gulf Coast, and it is unclear how the parties will reach an agreement regarding service on the Gulf Coast without Board consideration of Amtrak’s application. (See USDOT/FRA Letter 1 (“[D]espite an extended period of examination and the investment of significant funds, . . . there is no clear or imminent path toward the restoration of this service, absent the Board’s intercession.”).) Therefore, the Board will institute a proceeding.

The statute requires the Board to consider “whether an order would impair unreasonably freight transportation.” § 24308(e)(2)(A). While the Board will not require Amtrak to agree to completion of the previously commenced RTC study or grant the freight railroads’ motion to

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<sup>10</sup> The carriers note that “even if CSXT, NSR, and Amtrak disagreed about the results of the RTC study or about what recommended infrastructure was needed and what it might cost, that disagreement might be more suitable for resolution in a § 24308(a) terms and compensation case than in a § 24308(e) application.” (Mot. to Dismiss 15 n.41.) However, they do not argue that the application should be dismissed on this basis; therefore, the Board will not address the statement.

dismiss Amtrak's application because the study has not been completed, the Board recognizes the importance of a study that models—in the context of the line's present and future traffic volumes and engineering design and conditions—the specific service that Amtrak proposes in its application. The Board therefore expects that evidence on the service's potential effects on freight transportation, such as an RTC study or other study or studies, will be part of the record in this proceeding, as well as any competing studies or other competing evidence, together with all the inputs, assumptions, and methodologies underlying any study results, including all relevant traffic projections (filed under seal, if necessary). As part of this effort, the Board also expects the parties will detail any infrastructure that they consider necessary for Amtrak to operate additional trains by its proposed start date as well as infrastructure needed in the future to factor in anticipated growth in traffic. The information described above will allow the Board to assess whether the proposed additional train service can proceed without impairing unreasonably freight transportation.

The Board recognizes the concerns expressed by Alabama state leadership and some railroad and port entities, among others, regarding the potential impacts of passenger service on freight service in the New Orleans-Mobile corridor and the need for a study to assess those impacts and identify mitigation measures. However, as explained above, this proceeding, including evidence submitted by the parties, will provide a forum to assess precisely the matter of concern to Alabama state officials and others, i.e., whether the additional train operations will unreasonably impair freight transportation. Therefore, far from preventing the Board from considering the freight service issues associated with Amtrak's application, the current lack of unanimous state support for the service indicates a need for the Board to do so under the terms specified in 49 U.S.C. § 24308(e).

### **Environmental and Historic Reports**

CSXT and NSR argue that the application should be dismissed because Amtrak did not file the environmental and historic reports they claim are required by NEPA, the NHPA, and the Board's regulations at 49 C.F.R. §§ 1105.7 and 1105.8. They note the possibility that the restored service “will require dozens of miles of new sidings and yard bypass tracks as well as modifications to the drawbridges” and that the route is “in a region largely comprised of coastal wetlands, which present immense environmental challenges to any construction project.” (Mot. to Dismiss 17-18.)<sup>11</sup> Accordingly, they claim that a Board order granting Amtrak's request would require review under NEPA. (Mot. to Dismiss 18.) They recognize that the Board's regulations do not specifically identify this type of proceeding as requiring environmental review, but contend that the Board should require an environmental review under the catchall provision at 49 C.F.R. § 1105.6(b)(6) because of the potential for environmental impacts. (Id. at 18-19.)

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<sup>11</sup> CSXT and NSR note GCWG's description of NEPA review as “a critical next step” toward restoring passenger rail service. (Id. at 18; see also Appl., App. B, GCWG Report at 36 (“The infrastructure improvements recommended for the restoration of passenger rail service will require compliance with NEPA if federal funds are used.”).)

CSXT and NSR argue that an order to allow operation of additional trains under § 24308(e) can be distinguished from previous proceedings under § 24308(a) in which the Board and its predecessor did not conduct environmental review because “disputes [under § 24308(a)] generally involve an inability to agree on certain terms of service or resolving questions of ‘reasonable compensation’ that either do not require new infrastructure or turn on ministerial actions beyond NEPA’s reach.” (Mot. to Dismiss 19.) They argue that this proceeding is “fundamentally different” because the Board here must “determine whether and under what conditions to order additional trains” and note that any such order will likely require new infrastructure, leading to “multiple construction projects in environmentally sensitive areas using federal funds.” (*Id.* at 20.) In addition, citing 49 C.F.R. § 1105.8(a), they argue that Amtrak should have submitted a historic report.

Amtrak replies that § 24308(e) does not require it to file environmental and historic reports along with its application, and to require otherwise would contravene congressional intent that the statute provide an expedited procedure for the Board to issue an order for operation of additional trains. (Amtrak Reply 14, Apr. 26, 2021.) Amtrak states that it is not requesting that the Board order infrastructure projects; rather, it requests that the Board issue an order permitting it to run additional trains. (*Id.*) Amtrak states it does not believe that any construction or other infrastructure projects are required to restart Gulf Coast service beyond the improvements recommended in the GCGW Report as the “Minimum Needed for Passenger Rail Service,” and that the infrastructure improvements planned here do not trigger NEPA. (*Id.* at 14-17.)

CSXT responds that Amtrak’s claims in its reply cannot be reconciled with its application, which, according to CSXT, admits that some level of infrastructure enhancements would be necessary to support Amtrak’s proposed restoration of service. (CSXT Reply 3, May 11, 2021.) CSXT also notes that the Board routinely conducts environmental review in licensing cases, such as proposals to construct new lines or abandon lines, where the relevant organic statute does not itself explicitly require such review but NEPA requires environmental review regardless. (*Id.* at 4.)

An environmental report is not needed because environmental review under NEPA is not required.<sup>12</sup> Under the regulations of the Council on Environmental Quality (CEQ) implementing NEPA, agencies can identify in their NEPA procedures “categorical exclusions,” which CEQ defines at 40 C.F.R. § 1501.4(a) as “categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.” As the freight railroads note, (Mot. to Dismiss 18-19), this type of proceeding is not identified in the Board’s environmental rules as one that normally requires an environmental review. *See* 49 C.F.R. § 1105.6(a), (b). This proceeding is most analogous to a proceeding in which operating authority is sought. Such transactions are covered by one of the Board’s “categorical exclusions” and normally require no

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<sup>12</sup> Had environmental and historic reports been required, they would have been due to the Board with, or prior to, the applicant’s initiation of a proceeding. 49 C.F.R. §§ 1105.7(a), 1105.8(a).

environmental review (or filing of environmental reports) unless certain thresholds would be exceeded.<sup>13</sup> See 49 C.F.R. § 1105.6(b)(4), (c)(1)(i).

Here, the contemplated infrastructure improvements are categorically excluded from NEPA under § 1105.6(c)(1) because Amtrak’s proposed schedule will not trigger any of the applicable thresholds. The proposed Amtrak service will result in only four additional trains per day, well short of the level of operations the Board has determined has enough potential for environmental impacts to warrant environmental reporting and NEPA documentation (at least eight additional trains per day except in nonattainment areas). In addition, the record indicates that freight traffic between New Orleans and Mobile exceeds four trains per day, and therefore the proposed additional passenger trains would not result in a 100% increase in traffic. (See Mot. to Dismiss, Ex. F, Gulf Coast Passenger Serv. Implementation Study & Cost Estimate at 9.) Moreover, there is no indication that passenger service would result in a 100% increase in rail yard activity or diversion of traffic to trucks or other vehicles. Therefore, pursuant to § 1105.6(c)(1) and the applicable thresholds at § 1105.7(e)(5)(i), environmental review is not required.<sup>14</sup>

Even where the thresholds are not met, the Board’s regulations permit the Board to require environmental review of an operation transaction, regardless of the number of trains, where the potential for environmental impacts could be significant. 49 C.F.R. § 1105.6(d); see also § 1105.6(b)(6). However, no need to depart from the Board’s normal procedures has been shown in this case. CSXT and NSR raise concerns that Amtrak’s planned “new infrastructure

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<sup>13</sup> The thresholds that are typically applicable to an operation transaction are the air quality thresholds at 49 C.F.R. § 1105.7(e)(5). These thresholds differ depending on whether a rail line segment is in an area designated as in “attainment” or “nonattainment” with the National Ambient Air Quality Standards established under the Clean Air Act. For rail lines like these that are located in attainment areas, environmental documentation under NEPA normally will be prepared only if the proposed action would result in (1) an increase of at least eight trains per day on any segment of rail line affected by the proposal, (2) an increase in rail traffic of at least 100% (measured in annual gross ton miles), (3) an increase in carload activity at rail yards of at least 100%, or (4) an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment. See 49 C.F.R. § 1105.7(e)(5)(i). For rail lines in nonattainment areas, environmental documentation typically is required when the proposed action would result in (1) an increase of at least three trains per day on any segment of rail line, (2) an increase in rail traffic of at least 50% (measured in annual gross ton miles), (3) an increase in carload activity at rail yards of at least 20%, or (4) an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any given road segment. See 49 C.F.R. § 1105.7(e)(5)(ii).

<sup>14</sup> CSXT and NSR note that the projects will require federal funds, suggesting that proceedings related to that funding might require environmental review. (See Mot. to Dismiss 20; see also Appl., App. B, GCWG Report at 36 (“The infrastructure improvements recommended for the restoration of passenger rail service will require compliance with NEPA if federal funds are used.”).) However, the Board does not authorize or otherwise provide any funding for rail infrastructure projects. Any environmental review that is required due to federal funding would be initiated by the funding agency.

will lead to multiple construction projects in sensitive environmental areas.” (Mot. to Dismiss 20.) But this is a proposal to operate additional trains on lines on which Amtrak had previously operated, not a proposal to construct a new line.<sup>15</sup> Carriers do not need Board authority to repair, replace, rehabilitate, or rebuild their existing lines, and therefore can make improvements, operate additional trains and add infrastructure to such lines without environmental review even if the line has long been inactive and is in disrepair. See Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508 et al., slip op. at 6-9 (STB served Sept. 14, 1999), petition for review denied, Lee’s Summit, Mo. v. STB, 231 F.3d 39 (D.C. Cir. 2000); see also Lee’s Summit, Mo., 231 F.3d at 40; Union Pac. R.R., FD 33611, slip op. at 5 (fact that a line relocation or reactivation project may have environmental effects does not dictate that the Board perform an environmental review). The contemplated additional train operations and infrastructure improvements to CSXT’s and NSR’s lines would be similar to those that all railroads are free to do without Board authority and without environmental review. Any rail activity will have some impact on surrounding areas, but no showing has been made that the infrastructure improvements likely to result if Amtrak operates additional trains here would warrant departure from the Board’s normal process. Because environmental review is not required, Amtrak did not need to file an environmental report when it initiated a proceeding under § 24308(e).

Finally, a historic report is not needed because review under Section 106 of the NHPA is not required. Historic reports are required in proceedings involving the lease, transfer, or sale of a railroad’s line, sites, or structures. 49 C.F.R. § 1105.8(a). The lines at issue here will not be abandoned, leased, transferred, or sold, nor will there be a significant change in operations or in the maintenance level of the property. Therefore, a historic report is unnecessary. See Mo. Cent. R.R., FD 33508 et al., slip op. at 6 (explaining no historic report was required when the transaction would not affect historic properties).

### **Interim Order**

In its application, Amtrak requests that the Board “issue an interim order requiring [CSXT and NSR] to provide Amtrak with access to their rail lines between New Orleans and Mobile in order to perform all necessary preparations for the Gulf Coast Service to commence on or about January 1, 2022.” (Appl. 1.)<sup>16</sup> CSXT and NSR oppose Amtrak’s request. (Mot. to Dismiss 22-23.) Amtrak acknowledges that an interim order may not be necessary if CSXT and NSR voluntarily provide access to Amtrak. (Amtrak Reply 18-19, Apr. 26, 2021.)

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<sup>15</sup> A rail construction project—which does require Board authority and an environmental review—enables a carrier to penetrate a new market or enter a new territory. Union Pac. R.R.—Pet. for Declaratory Order—Rehab. of Mo.-Kan.-Tex. R.R. between Jude & Ogden Junction, Tex., FD 33611, slip op. at 5 (STB served Aug. 21, 1998). In contrast, Amtrak here only seeks an order allowing it to provide additional trains in an area where it and the freight railroads had operated until service was shut down by Hurricane Katrina. It is noteworthy that when CSXT and NSR resumed their own service, they did not engage the Board’s environmental review process as they are arguing Amtrak must do here.

<sup>16</sup> Amtrak has since clarified that it does not seek to “alter infrastructure” or CSXT’s or NSR’s property. (Amtrak Reply 18, Apr. 26, 2021.)

On July 6, 2021, Amtrak wrote “to advise the Board of the current status of Amtrak’s ongoing discussions with CSX[T] and NS[R] to allow Amtrak access to CSX[T] and NS[R] properties and personnel.” (Amtrak Notice 1-2.) Amtrak explains that CSXT agreed to Amtrak’s request for access to CSXT property and personnel for certain purposes. (Id. at 2.) In addition, NSR informed Amtrak that its “existing service over NS[R] lines in New Orleans would fully facilitate Amtrak’s access to the safety and operational information Amtrak sought to obtain.” (Id.) On July 9, 2021, CSXT and NSR responded that the request for an interim order is moot in light of Amtrak’s July 6 filing.

The Board finds that these developments have rendered Amtrak’s request for an interim order moot. It appears that Amtrak has received the limited, non-interfering access it sought. (See Amtrak Reply 18, Apr. 26, 2021.) The Board is pleased that the parties have been able to work together to reach a suitable accommodation on this particular issue and expects them to continue to resolve areas of disagreement such as this as much as possible.

### **Procedural Schedule and Hearing Format**

In its application, Amtrak proposed a procedural schedule under which, among other things, CSXT and NSR would make opening filings 30 days from a Board decision instituting a proceeding. Amtrak reasoned that CSXT and NSR “bear the burden of proof under the statute and therefore should file the opening brief(s).” (Appl. 6 n.13.) CSXT and NSR object to Amtrak’s proposed schedule, arguing that if the Board were to deny their motion to dismiss, they should have the opportunity to propose an alternative schedule that allows time for discovery and completion of a modeling study. (Mot. to Dismiss 26.)

To expedite the proceeding, the Board will adopt a procedural schedule in this decision. This schedule will include an discovery period, which, along with the time for CSXT and NSR to file their opening evidence, will allow sufficient time for completion of any supporting study or studies and other record development while otherwise enabling this proceeding to move forward expeditiously. The Board encourages the parties to resolve discovery disputes promptly and to recognize that discovery before the Board is broad. See 49 C.F.R. § 1114.21(a)(1)-(2). The Board notes, for example, that the disagreement regarding Amtrak access to CSXT and NSR information provided to HDR for the RTC study appears to involve information that would typically be shared, pursuant to a protective order, in a Board proceeding. However, if parties cannot resolve discovery disputes, they should make every effort to raise them as soon as possible within the discovery period. After the discovery period ends, the Board will not look favorably upon requests to pause the procedural schedule to resolve such disputes.

After CSXT and NSR file rebuttal evidence, the parties shall confer in an attempt to develop a joint proposal on the hearing format. They shall either submit a joint proposal or individual proposals, after which the Board will determine the hearing format and establish hearing date(s). The Board also expects to hold a prehearing conference with the parties.

Discovery period ends	<b>September 20, 2021</b>
CSXT and NSR opening evidence	<b>October 20, 2021</b>
Amtrak reply evidence	<b>November 19, 2021</b>
CSXT and NSR rebuttal evidence	<b>December 9, 2021</b>
Proposal(s) on hearing format	<b>December 16, 2021</b>

### **Administrative Law Judge**

The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges (ALJs) on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially all disputes concerning discovery in this proceeding. Parties are directed to send copies of all their filings and documents in this proceeding to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at [ctolbert@fmshrc.gov](mailto:ctolbert@fmshrc.gov) and [zbyers@fmshrc.gov](mailto:zbyers@fmshrc.gov).

It is ordered:

1. A proceeding pursuant to § 24308(e) is instituted.
2. All filings to date are accepted into the record.
3. The motion to dismiss is denied.
4. Amtrak's request for an interim order is denied as moot.
5. The procedural schedule described above is adopted.
6. This proceeding is assigned to Administrative Law Judge Thomas McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.
7. In addition to filing pleadings with the Board and serving copies on parties of record, parties must send a copy of all filings and documents to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Washington, DC 20004-1710, and at [ctolbert@fmshrc.gov](mailto:ctolbert@fmshrc.gov) and [zbyers@fmshrc.gov](mailto:zbyers@fmshrc.gov).
8. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.
9. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at [karyn.lusby@opm.gov](mailto:karyn.lusby@opm.gov). Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

10. This decision is effective on its service date.

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