

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33381

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORP. UNDER  
49 U.S.C. 24308(a)--SPRINGFIELD TERMINAL RAILWAY COMPANY, BOSTON AND  
MAINE CORPORATION, AND PORTLAND TERMINAL COMPANY

Decided: May 5, 1997

By application filed March 19, 1997, the National Railroad Passenger Corporation (Amtrak) asks the Board to establish an evidentiary schedule for a proceeding under 49 U.S.C. 24308(a)<sup>1</sup> that will: (1) require Springfield Terminal Railway Company (STR), Boston and Maine Corporation (B&M), and Portland Terminal Company (PTC), railroads under common control of Guilford Rail System, to make available rail lines and services necessary for Amtrak to initiate and operate a new route between the Massachusetts/New Hampshire State line and Portland, ME;<sup>2</sup> and (2) determine reasonable terms and compensation for Amtrak's use of the facilities and services.

BACKGROUND

Amtrak indicates that, in 1991, Congress directed it to institute passenger service between Boston, MA, and Portland, ME, and appropriated \$30 million to enable Amtrak to rehabilitate and improve the involved Plaistow-Portland line, which is owned by B&M and PTC and leased to STR. Local sources will provide an additional \$7.6 million for track improvements.<sup>3</sup> Amtrak states that, although it has negotiated extensively with B&M and the Northern New England Passenger Rail Authority (NNEPRA)<sup>4</sup> and the parties have reached tentative agreement in most areas, there remain certain outstanding issues between Amtrak and B&M that may require the Board's resolution. Accordingly, Amtrak asks us to adopt a procedural schedule for discovery and the submission of evidence and argument.<sup>5</sup>

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<sup>1</sup> Originally, section 402(a) of the Rail Passenger Service Act was codified at 45 U.S.C. 562(a). Pub. L. No. 103-272, 108 Stat. 745, enacted on July 5, 1994, recodified section 402(a) as 49 U.S.C. 24308(a). Section 205 of the ICC Termination Act of 1995 replaced references to the Interstate Commerce Commission in this and other statutory provisions with references to the Surface Transportation Board.

<sup>2</sup> This 78-mile line extends between Plaistow, NH, and Portland, ME (referenced in this proceeding as the Plaistow-Portland line). Because it is owned for the most part by B&M, and in view of the usage in B&M's pleadings, we will collectively reference the Guilford parties as B&M.

<sup>3</sup> B&M employees will perform the track upgrade.

<sup>4</sup> NNEPRA was created by the State of Maine in June 1995 as the successor in interest to the Maine Department of Transportation (MDOT) in implementing Amtrak's extension of passenger service between Boston and Portland. On April 14, 1997, NNEPRA filed a petition to intervene, stating that it will comply with all obligations of parties in our proceedings, including those related to discovery. B&M does not oppose NNEPRA's intervention as long as its participation does not shield MDOT or the State of Maine from the evidentiary obligations of a party. NNEPRA's request will be granted without B&M's condition. If B&M wishes to depose State or MDOT employees not under NNEPRA's control, our rules provide the means for it to do so. 49 CFR 1114.22.

<sup>5</sup> Amtrak initially proposed a 150-day evidentiary schedule ending August 15, 1997. In its most recent filing, Amtrak submitted its opening statement 17 days earlier than it originally proposed. In view of its earlier filing, Amtrak now recommends a 133-day schedule ending July 30, 1997.

In reply, B&M filed a motion for summary judgment, asking us to impose on Amtrak the terms of what B&M describes as a July 1995 agreement between itself and Amtrak on the terms and conditions for Amtrak's use of the Plaistow-Portland line. B&M argues that imposition of the "agreement" is necessary to ensure that rehabilitation commences with the 1997 construction season and passenger rail service begins in Maine by 1998. B&M maintains that, while it is ready and willing to begin the track improvements, Amtrak does not want to implement passenger service in Maine and is attempting to delay and foreclose the service mandated by Congress.

Amtrak and NNEPRA oppose B&M's motion for summary judgment. Amtrak indicates that, because several significant issues as to liability costs and assignment of rights remain unresolved, Amtrak has never entered into an agreement with B&M for the use of the line. Amtrak argues that, if there was an agreement between it and B&M, which Amtrak strongly denies, the proper forum for the remedy B&M seeks would be an enforcement action in court, not with the Board. NNEPRA maintains that denying the motion and requiring the parties to substantiate their cost evidence will ensure that public funds will be spent prudently in rehabilitating the line and operating the passenger service.

On April 22, 1997, B&M filed a motion for leave to file a reply to Amtrak's reply to the motion for summary judgment. B&M contends that Amtrak's reply raises issues that could not have been previously addressed and that new facts have developed after Amtrak filed its reply. To the contrary, we find B&M's submission to be cumulative. Its assertions regarding the negotiators' meeting of the minds as to the substantive issues and the veracity of Amtrak's senior managers are argumentative. They add nothing new. If B&M wishes, it can raise these assertions when it files its opening statement. Because B&M has failed to justify a departure from 49 CFR 1104.13(c) prohibiting a reply to a reply, its motion for leave will be denied.<sup>6</sup>

Amtrak filed its opening statement on April 15, 1997, and suggested that B&M file its opposing statement 45 days later, on May 29, 1997. In reply, B&M asks the Board to issue subpoenas that it can use to compel third parties to testify and produce documents. B&M states that it has served depositions on certain employees of the U. S. Department of Transportation (DOT), General Accounting Office (GAO), and Office of Management and Budget (OMB). According to B&M, because the individuals are not parties and thus are under no obligation to respond, subpoenas issued by the Board will facilitate its discovery.

On April 16, 1997, B&M requested that the Board "issue subpoenas that B&M can use for third party discovery." B&M noted that it had that day served notices of deposition and requests for production of documents upon DOT, GAO and OMB. Citing the "compressed time schedule" proposed by Amtrak for submission of B&M's case, B&M asked that the Board issue the subpoenas without waiting for the three agencies to reply to B&M's discovery requests.

On April 24, 1997, the U.S. Department of Justice (DOJ), representing OMB, replied to B&M's discovery request. Stating that the "vast majority" of the materials sought by B&M are available from Amtrak and that the relevance of the materials is not readily apparent, and also citing the "potential overbreadth and burdensomeness" of B&M's request, DOJ refused to comply with the discovery request.

On April 25, 1997, B&M asked that we issue a subpoena requiring OMB to comply with B&M's discovery request. This filing, though not labeled a motion to compel, constitutes such a request and we will treat it as such.

In the motion to compel, as in its original request to OMB, B&M expresses concern about Amtrak's financial condition. B&M contends that, in prior negotiations, Amtrak had offered to indemnify B&M from liability arising out of injury or death of any Amtrak passenger. B&M therefore wishes to obtain documents providing information on Amtrak's financial condition and documents, internal and public, indicating OMB's views on Amtrak's financial condition.

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<sup>6</sup> B&M also tendered a substantive reply with its motion.

On April 25, 1997, B&M asked DOJ to provide an opinion to the Board as to whether the United States would be liable for unpaid obligations imposed on Amtrak under 49 U.S.C. 24308(a). On the same day, in a footnote in B&M's motion asking the Board to compel OMB to respond to the railroad's discovery request, B&M advised the Board that it had sought the opinion from DOJ and noted that "an opinion would be more likely if the Board itself were to join B&M in seeking the Attorney General's view of this important issue." On April 30, 1997, B&M formally requested that the Board seek DOJ's opinion on this matter.

#### DISCUSSION AND CONCLUSIONS

It is apparent that a final agreement for Amtrak's operation over the Plaistow-Portland line has not been reached. The materials submitted by B&M in support of its motion make clear that Amtrak never signed a contract with B&M. The basis for B&M's motion is belied by its own evidentiary submission. Accordingly, B&M's motion for summary judgment will be denied.

Amtrak's request that we establish a procedural schedule will be granted. Although it proposes a 133-day evidentiary schedule, Amtrak notes that 49 U.S.C. 24308(a)(2)(C) may be read to impose a 90-day deadline on this case. Amtrak maintains, however, that the 90-day decisional requirement merely requires that Amtrak be given interim access to tracks and facilities within 90 days. The Board's determination of the terms and compensation may be issued at a later date, according to the applicant. Amtrak also indicates that a resolution within 90 days would serve no purpose because it could not commence passenger service until the line is rehabilitated--a process that, in turn, will start only after the Board issues a decision on the merits of its application. Amtrak's position is consistent with the Board's previous rulings in this regard. *See, e.g., Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)*, STB Finance Docket No. 32911 (STB served May 7, 1996). There, because of the numerous and complex costing issues involved in the proceeding, the Board adopted the parties' requested 210-day evidentiary schedule.

To provide B&M more time for discovery, we will increase the period (from 45 days to 73 days) B&M has to conduct discovery before its first evidentiary statement is due. A longer discovery period, with simultaneous opening and reply briefs, is similar to the procedure we provided in STB Finance Docket No. 32911, *supra*. Also, the new schedule corresponds to the evidentiary period originally proposed by Amtrak.

We will deny B&M's motion that we compel discovery from OMB. While we often assign discovery issues to an Administrative Law Judge for resolution, we can resolve this matter ourselves. Information on Amtrak's finances is available in the public domain or from Amtrak. OMB's opinions about that information, like anybody else's opinions, provides no new data. They merely provide insight about how OMB views that information. OMB's analytical process is not an issue in this case. B&M has offered no justification in support of its request that we issue subpoenas to GAO and DOT, and we therefore see no reason to take that action. Moreover, as discussed below, it is not clear to us that the information sought would be relevant to any function we are required to perform under the statute.

We will also deny B&M's request that we join that railroad in asking the Attorney General to opine on whether the United States would be liable for certain of Amtrak's obligations. It appears to us that the law requires Amtrak to operate the service in question; it requires B&M to provide access; and it requires us, upon request, to set the terms and conditions and, in particular, the price, of the service. At least at this time, it does not appear that the question of Amtrak's long-term viability or the question that B&M raises with the Attorney General will be directly relevant to the action that we are required to take here.

*It is ordered:*

1. A proceeding is instituted pursuant to 49 U.S.C. 24308(a).
2. NNEPRA's request to intervene is granted.

3. B&M's request for subpoenas, and its motions for summary judgment and leave to file a reply to a reply, are denied.

4. B&M's request that we join it in seeking an opinion from the Attorney General is denied.

5. The schedule for this proceeding is established as follows:

a. B&M's evidentiary submission is due June 27, 1997.

b. Simultaneous opening briefs are due July 25, 1997.

c. Simultaneous reply briefs are due August 16, 1997.

6. Discovery will be available to the parties under 49 CFR part 1114.

7. This decision is effective on May 6, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary