

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
August 25, 2016
Part of
Public Record**

**Petition by National Railroad Passenger
Corporation for Relief Pursuant to
49 U.S.C. § 24905**

STB Finance Docket No. 36048

**MOTION FOR LEAVE TO FILE A RESPONSE TO AMTRAK'S REPLY TO MBTA'S
PETITION TO HOLD PROCEEDING IN ABEYANCE**

William M. Jay
Brian T. Burgess
Jaime A. Santos
GOODWIN PROCTER LLP
901 New York Avenue NW
Washington, D.C. 20001
Phone: (202) 346-4000
Fax: (202) 346-4444
WJay@goodwinlaw.com
BBurgess@goodwinlaw.com
JSantos@goodwinlaw.com

Robert A. Wimbish
Thomas J. Litwiler
FLETCHER & SIPPEL LLC
29 N. Wacker Drive, Suite 920
Chicago, IL 60606
Phone: (312) 252-1504
Fax: (312) 252-2400
rwimbish@fletcher-sippel.com
tlitwiler@fletcher-sippel.com

Kevin P. Martin
Eileen L. Morrison
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Phone: (617) 570-1000
Fax: (617) 523-1231
KMartin@goodwinlaw.com
EMorrison@goodwinlaw.com

John C. Englander
MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY
10 Park Plaza
Boston, MA 02116
Phone: (857) 368-8600
Fax: (857) 368-0615

*Counsel for Massachusetts Bay
Transportation Authority*

The Massachusetts Bay Transportation Authority (“MBTA”) hereby moves for leave to respond to the National Railroad Passenger Corporation’s (“Amtrak”) Reply to MBTA’s Petition to Hold Proceeding in Abeyance (“Reply”), filed on August 22, 2016. Although a reply to a reply is generally not permitted, *see* 49 C.F.R. § 1104.13(c), the Board in practice allows a petitioning party to respond to a reply when doing so would clarify the parties’ arguments or simplify the issues before the Board, “[i]n the interest of compiling a full record.” *See, e.g., Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, Docket No. NOR 42133 (STB served Mar. 9, 2012) at 1 n.1; *City of Alexandria, Virginia–Petition for Declaratory Order*, Docket No. FD 35157 (STB served Nov. 6, 2008) at 2.¹

To clarify and simplify the issues before the Board, MBTA requests that the Board accept MBTA’s response to Amtrak’s Reply. Among other grounds, Amtrak offers for the first time in its Reply a new theory about the nature of these proceedings that is absent from – indeed, inconsistent with – its Petition for Relief. Whereas Amtrak’s Petition for Relief states that this proceeding will be a “simple process” because the Board’s duty under 49 U.S.C. § 24905 is to simply “use the policy” developed by the Northeast Corridor Commission (“Commission”), incorporate Attleboro Line-specific data, “and enforce its finding on the parties,” Amtrak Mem. 15, Amtrak’s Reply to MBTA’s petition for an abeyance newly reads the statute to grant the Board discretion whether to accept and apply the Policy at all, *id.* at 5. It is on this basis that Amtrak opposes an abeyance, as it argues that the scope of the Board’s authority is an open question and that this Board’s decision on the merits will inform the district court’s constitutional analysis.

¹ *See also* 49 C.F.R. § 1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

Amtrak's arguments have complicated the issues presented to the Board in MBTA's request for an abeyance, both by exceeding the scope of Amtrak's Petition for Relief and by mischaracterizing the relationship between this proceeding and the District Court Litigation. MBTA therefore seeks leave to file its response so that it may briefly address Amtrak's new theory regarding the Board's discretion, explain why Amtrak's new theory is irrelevant to the District Court Litigation, and correct other misstatements of fact and law found in Amtrak's reply. MBTA's response will not broaden the issues raised in these proceedings and therefore will not prolong this proceeding or prejudice any party to it. For these reasons, MBTA respectfully requests the Board's leave to file a response to Amtrak's Reply.

DATED: August 25, 2016

Respectfully submitted,

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY

By its attorneys,

/s/ Kevin P. Martin

*Counsel for Massachusetts Bay
Transportation Authority*

William M. Jay
Brian T. Burgess
Jaime A. Santos*
GOODWIN PROCTER LLP
901 New York Avenue NW
Washington, D.C. 20001
Phone: (202) 346-4000
Fax: (202) 346-4444
WJay@goodwinprocter.com
BBurgess@goodwinprocter.com

Kevin P. Martin
Eileen L. Morrison
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
Phone: (617) 570-1000
Fax: (617) 523-1231
KMartin@goodwinprocter.com
JSantos@goodwinprocter.com
EMorrison@goodwinprocter.com

*Admitted only in California and Massachusetts;
practice supervised by William M. Jay

Robert A. Wimbish
Thomas J. Litwiler
FLETCHER & SIPPEL LLC
29 N. Wacker Drive, Suite 920
Chicago, IL 60606
Phone: (312) 252-1504
Fax: (312) 252-2400
rwimbish@fletcher-sippel.com
tlitwiler@fletcher-sippel.com

John C. Englander
MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY
10 Park Plaza
Boston, MA 02116
Phone: (857) 368-8600
Fax: (857) 368-0615

CERTIFICATE OF SERVICE

I hereby certify that on this 25TH day of August, 2016, a copy of the foregoing MOTION FOR LEAVE TO FILE A RESPONSE TO AMTRAK'S REPLY TO MBTA'S PETITION TO HOLD PROCEEDING IN ABEYANCE was served via e-mail, as agreed upon by the Parties, upon the following:

Neil K. Gilman
Rachel E. Mossman
Hunton & Williams LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
ngilman@hunton.com
rmossman@hunton.com

Thomas R. Waskom
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 Easty Byrd Street
Richmond, VA 23219
twaskom@hunton.com

/s/ Jaime A. Santos

Jaime A. Santos*
GOODWIN PROCTER LLP
901 New York Avenue NW
Washington, D.C. 20001
Phone: (202) 346-4000
Fax: (202) 346-4444
JSantos@goodwinlaw.com

*Counsel for Massachusetts Bay Transportation
Authority*

* Admitted only in California and Massachusetts; practice supervised by William M. Jay.