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EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

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

**AMTRAK'S MOTION FOR REDESIGNATION AND PRODUCTION OF RAIL TRAFFIC
CONTROLLER STUDY MATERIALS AND FOR EXPEDITED CONSIDERATION OF SAME**

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The National Railroad Passenger Corp. (“Amtrak”) hereby moves the Surface Transportation Board (“Board”) to order the redesignation of all materials produced in connection with the 2020 and 2021 Rail Traffic Controller (“RTC”) studies in this matter from “Highly Confidential” to “Confidential” so that Amtrak personnel can work with L.E. Peabody & Associates to respond to the Board’s requests of May 12, 2022, for additional RTC modeling.¹ In the alternative, Amtrak requests that the Board amend the Protective Order to allow a small group of Amtrak personnel access to this “Highly Confidential” information after they sign the undertaking pursuant to the Protective Order. Amtrak further moves the Board to order CSX Transportation, Inc. (“CSX”) and Norfolk Southern Railway Company (“NS”) to produce the additional RTC analyses that Mr. Mark Dingler testified he performed during the hearing on the record, as well as all supporting workpapers. Because the Board has ordered that any additional information must be submitted by June 13, 2022, Amtrak respectfully requests that the Board expedite its consideration of this motion.

BACKGROUND

On April 13, 2021, the Board entered a Protective Order in this proceeding that allows a party to designate “competitively sensitive information” as “highly confidential.” (See April 13, 2021 Decision Granting Protective Order at ¶ 2.) Materials designated as “highly confidential” may only be shared with a party’s outside counsel or outside consultants. (*Id.*) In this proceeding, CSX and NS have designated essentially all of the materials and workpapers related to both the 2020 and the 2021 RTC analyses as “Highly Confidential.” On multiple occasions, Amtrak has

¹ In making this motion, Amtrak does not waive and instead expressly reserves all rights to argue that at the conclusion of the hearing on the record, the Board erroneously shifted the burden of proof to Amtrak and that the Board’s requests for additional information from Amtrak are improper. However, because the Board warned that Amtrak would “proceed at its peril” if Amtrak failed to comply with the Board’s requests for additional information, Amtrak is attempting to fulfill the Board’s requests for additional information and requires the relief sought herein to do so.

requested that CSX and NS reconsider these designations so that Amtrak personnel can view the information and speak freely with Amtrak's outside consultants about the RTC modeling. Some of this exchange is detailed in Amtrak's December 3, 2021 Motion to Allow Public Filing.

CSX and NS have repeatedly refused Amtrak's requests. They have taken the absolutist position that "[a]ll documents, data, and information that reflect the movement of trains" on their networks is "commercially sensitive," including "OS data, train profile data, dispatch data, operating plans, and actual train movement data." (Motion to Allow Public Filing Ex. C, at 2). Thus, essentially all of the information about inputs into the RTC models and workpapers from the RTC models cannot be viewed by or discussed with anyone from Amtrak.

Consequently, there is a stark information asymmetry in this case. Amtrak personnel who are most familiar with the Gulf Coast corridor and with RTC modeling are unable to work on or to direct any of the additional RTC modeling requested by the Board. To be sure, Mr. Thomas Crowley and Mr. Daniel Fapp of L.E. Peabody & Associates can access the information, but they cannot consult with Amtrak personnel other than in the vaguest of terms about the inputs to the model. Mr. Crowley and Mr. Fapp also cannot freely discuss with Amtrak personnel modeling any potential operational changes because they cannot reveal anything about CSX or NS actual train movement data. Accordingly, Amtrak is not able to conduct RTC modeling in the same way the CSX/NS "clean team" apparently directed the 2021 RTC model, by sitting in the room with their RTC modelers and talking through various issues and scenarios. This places Amtrak at a significant disadvantage in attempting to respond to the Board's requests for additional RTC modeling.

Accordingly, on Monday, May 16, 2022, counsel for Amtrak sent an email to counsel for CSX and NS requesting (yet again) that they redesignate all materials related to the 2020 and 2021 RTC studies as confidential so that Amtrak personnel could work with L.E. Peabody & Associates

on the additional modeling requested by the Board. (Email from Jessica Amunson, Jenner & Block LLP to Raymond Atkins, Sidley Austin LLP, et al. (May 16, 2022, 11:43 a.m. EDT) (on file).) Counsel for the parties subsequently met and conferred. During those discussions, counsel for Amtrak stated that Amtrak would entertain alternative solutions to the proposed redesignation, if CSX and NS preferred some other approach to facilitating access for Amtrak personnel. Counsel for Amtrak also explained that Amtrak understood CSX's and NS's desire to keep information from each other, as they are competitors, but emphasized that CSX's and NS's interest in protecting certain information from their competitors does not provide any basis to keep this information from Amtrak. Amtrak further explained that its ultimate objective was to allow the Amtrak personnel who are familiar with the Gulf Coast corridor and with RTC modeling to be able to speak freely with, sit in a room with, and participate with Mr. Crowley and Mr. Fapp in submitting the additional RTC analyses requested by the Board. Amtrak stated that it was willing to consider any proposal CSX and NS might have to achieve that objective. Attempting to find a constructive solution, counsel for Amtrak also proposed that rather than redesignating, CSX and NS simply agree to allow a small number of Amtrak personnel to execute the undertaking under the Protective Order for access to the "Highly Confidential" RTC information. Amtrak offered to provide names to CSX and NS of such personnel.

On the morning of May 19, 2022, counsel for CSX informed Amtrak that CSX and NS would not agree to any redesignation of the RTC study materials, nor would they agree to any other arrangement for Amtrak personnel to work with any RTC information that CSX and NS designated "Highly Confidential."

Relatedly, in that same May 16, 2022 email, counsel for Amtrak also requested that CSX and NS provide the additional RTC analyses that Mr. Dingler testified he performed during the hearing on the record. As the Board will recall, Mr. Dingler testified that he performed additional

RTC analyses with respect to (1) modeling changes to movable bridge openings to account for automation and removal of bridge tenders; and (2) modeling shorter trains. *See generally* Hr’g Tr. at 1835-56. Mr. Dingler ultimately did not present those analyses based on the parties’ stipulation that absent contrary instructions from the Board, the parties would not solicit on direct examination from their experts any new analysis that had not been disclosed previously. *See id.* at 1930-32. However, at this point, the Board has invited the parties to perform additional analyses and the analyses already performed by Mr. Dingler are not only relevant to the Board’s instructions, but may be submitted. Accordingly, Amtrak requested that CSX and NS produce these analyses to Amtrak by May 18, 2020, along with any supporting workpapers. On the morning of May 19, 2022, counsel for CSX informed counsel for Amtrak that CSX would not be providing that information to Amtrak.

ARGUMENT

In its comments on May 12, 2022, the Board suggested that the most productive path forward in this matter would be for the parties to all get into a room together to discuss the RTC model and the various infrastructure proposals. One week later, not only have CSX and NS refused to invite Amtrak into a room with them to discuss their RTC model, *CSX and NS will not even agree to allow Amtrak's outside consultants to get in a room with Amtrak's own personnel most knowledgeable about the corridor.*

For material to qualify as “highly confidential,” the material must be “deemed so sensitive that it can only be shared with outside counsel and consultants” and “the designating party should have the burden of showing serious competitive harm from disclosure.” (Email from Matthew Warren, Sidley Austin LLP, to Jessica Amunson et al., Jenner & Block LLP (Apr. 5, 2021, 11:38 a.m. EDT) (on file).) Amtrak has repeatedly asked what “serious competitive harm” will occur if the information for the RTC model is made available to Amtrak personnel so that those personnel

can work with Amtrak's outside consultants on RTC modeling, including modeling potential operational changes. CSX and NS have yet to provide any answer to that question.

The Board has made clear that the standard for designating material as "Highly Confidential" is that disclosure of the information to the other party's internal personnel would cause the designating party "serious competitive injury." *See, e.g., Minnesota N. R.R., Inc.-Trackage Rights Exemption-the Burlington N. and Santa Fe Ry. Co.*, FD 33337, slip op. at 1 (S.T.B. served Mar. 6, 1997). Further, when the Board has decided to restrict access to information, it has done so upon a finding that disclosure could "create a competitive advantage" by "reveal[ing] highly sensitive information" that could be used for the other party's "private, commercial purposes." *Req. for Waybill Data*, WB 20-50, slip op. at 4 (S.T.B. served June 17, 2021). None of that reasoning is applicable here. Amtrak is not CSX's or NS's competitor in the freight rail industry and is not seeking access to information for "private, commercial purposes." Amtrak is seeking access to information simply to comply with the Board's requests.

It is not unheard of for a protective order to be modified to allow certain internal personnel to access "Highly Confidential" information. Indeed, CSX and NS have themselves previously agreed to modify a protective order to allow other parties' internal personnel to access information where those personnel were "responsible for making recommendations" to the affected party "with respect to the matters raised by th[at] proceeding," and those personnel asserted that "to fulfill their responsibilities, the Designated Personnel must have access to all the records in this proceeding, including those designated Highly Confidential." *CSX Corp/ and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Rwy. Co.—Control and Operating Leases/Agreements*, FD 33388, slip op. at 1 (S.T.B. served Oct. 17, 1997). It is unclear why CSX and NS will not make the same arrangements here.

At the close of the hearing on the record on May 12, 2022, the Board informed Amtrak that it was “Amtrak’s job” to provide the Board with an RTC model that showed whether “operational changes could avoid the need for the infrastructure,” including whether it was possible to “reschedule a train” and therefore avoid spending taxpayers’ money. Amtrak respectfully disagrees that it is “Amtrak’s job” to provide the Board with such evidence and Amtrak will present that argument to the Board more fully at a later date. But for now, Amtrak simply cannot perform the job the Board asked Amtrak to perform unless Amtrak personnel can work with Amtrak’s outside consultants on the RTC modeling. And Amtrak personnel cannot work with Amtrak’s outside consultants on RTC modeling unless one of two things happens: (1) all materials related to the 2020 and 2021 RTC models are redesignated from “Highly Confidential” to “Confidential”; or (2) a small group of Amtrak personnel are permitted to access “Highly Confidential” data after executing the undertaking of the Protective Order.²

CONCLUSION

For the above stated reasons, Amtrak respectfully requests that the Board immediately order that (1) all discovery materials and workpapers produced in connection with the 2020 and 2021 RTC studies shall be designated as “Confidential;” or in the alternative (2) the Protective Order be amended to allow Amtrak personnel access to any discovery materials and workpapers produced in connection with the 2020 and 2021 RTC studies that are designated as “Highly Confidential” provided that such personnel execute the “Highly Confidential” undertaking of the Protective Order.

² Those Amtrak individuals are Jim Blair (Host Railroads), Kyle Montgomery (Host Railroads), Doug Reisner (Transportation), Jeff Gerlach (Planning), Davis Dure (Planning), John Rhodes (Planning), and Tim Wells (Planning).

Amtrak also respectfully requests the Board order the immediate production of all additional RTC analyses performed by Mr. Dingler, along with any supporting workpapers, including but not limited to the additional analyses Mr. Dingler testified about at the hearing on the record.

May 19, 2022

Respectfully submitted:

/s/ Jessica Ring Amunson

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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 use of the service list, consistent with 49 C.F.R. § 1104.12.

/s/ Jessica Ring Amunson
Jessica Ring Amunson

May 19, 2022