

SERVICE DATE — FEBRUARY 21, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42175

COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f)—FOR SUBSTANDARD PERFORMANCE OF AMTRAK’S
SUNSET LIMITED TRAINS 1 AND 2

Digest:¹ The Board provides direction to the National Railroad Passenger Corporation (Amtrak) and Union Pacific Railroad Company (UP) in response to Amtrak’s motion to redact portions of UP’s reply brief.

Decided: February 20, 2025

On January 15, 2025, the National Railroad Passenger Corporation (Amtrak) filed a motion asking the Board to immediately remove Union Pacific Railroad Company’s (UP) December 23, 2024 reply brief from the public docket.² On the same day, notice was served that the filing that was the subject of Amtrak’s motion had been temporarily removed from the agency’s website while the Board considered the motion. See Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175 (STB served Jan. 15, 2025). In a decision served on January 16, 2025 (January 16 Decision), Amtrak was directed to provide a status report regarding its efforts to resolve the issue identified in its motion. The Board also directed that any replies to Amtrak’s motion be filed by January 21, 2025. On January 17, 2025, Amtrak filed the status report and a motion for further relief. On January 21, 2025, UP filed a reply to both of Amtrak’s motions. In accordance with the instructions provided in the January 16 Decision, Amtrak’s January 17 filings and UP’s January 21 filing were filed as Highly Confidential.

¹ 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).

² The contents of Amtrak’s January 15 motion were redacted as “Highly Confidential” information pursuant to the protective order adopted for this proceeding. See Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2 (Protective Order) (Decision ID No. 51823), NOR 42175 (STB served Aug. 18, 2023). While attempting to avoid references to confidential information in Board decisions, the Board retains the discretion to rely upon and disclose such information in decisions when necessary. See Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 n.2 (STB served Jan. 11, 2018). In this case, the Board cannot adequately present its findings without disclosing certain information designated as Highly Confidential.

Amtrak's Motions. In its motions, Amtrak argues that UP's reply brief improperly disclosed information that could result in competitive harm to Amtrak. Specifically, Amtrak identifies 10 portions of UP's reply brief that Amtrak contends should be treated as Highly Confidential. (Amtrak Mot. 3-4, Jan. 17, 2025.) In its January 15 motion, Amtrak requested that the Board immediately remove UP's December 23 reply brief from the Board's public docket. (Amtrak Mot. 1, Jan. 15, 2025.) In its January 17 motion, Amtrak requests the Board order that (1) parties to this proceeding and their personnel delete all copies of UP's reply filing immediately and certify the deletion to Amtrak within 48 hours (with the exception of outside counsel or experts entitled to see Highly Confidential information under the protective order); and (2) individuals and entities making submissions in this proceeding are prohibited from re-docketing UP's December 23 reply brief or otherwise disclosing the material that Amtrak seeks to redact from that filing. (Amtrak Mot. 1-2, Jan. 17, 2025.)

In support of its requests, Amtrak cites several past instances in which the subject information was designated as confidential. (Amtrak Mot. 6-7, Jan. 17, 2025.) Amtrak notes that, pursuant to the Board's protective order, it designated the subject information as Highly Confidential in a previously submitted filing in this proceeding. (Amtrak Mot. 2, Jan. 15, 2025.) Amtrak states that it also protected the information from public disclosure in a prior proceeding before the Board with UP's agreement and that the Board has previously recognized that the subject information is commercially sensitive and directed that it be filed under seal. (*Id.* at 2, (citing Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., Docket No. FD 35743, slip op. at 5 (STB served Apr. 15, 2014)); Amtrak Mot. 5, Jan. 17, 2025 (citing CSX Transp., Inc.—Joint Use—Louisville & Ind. R.R., FD 35523 (STB served July 11, 2013)) and Va.—Acquis. & Operation of Certain Assets of CSX Transp., Inc., FD 36544 (STB served Oct. 6, 2021).) Amtrak also states that it has protected the same type of information from being disclosed in response to Freedom of Information Act (FOIA) requests on confidentiality grounds. (Amtrak Mot. 5-6, Jan. 17, 2025.)

Amtrak further states that it has repeatedly advised UP in the ordinary course of business that the information is competitively sensitive. (Amtrak Mot. 2, Jan. 15, 2025; Amtrak Mot. 7, Jan. 17, 2025.) Amtrak notes that while there is no express confidentiality provision requiring UP to keep the information confidential, the parties have done so for more than two decades. (Amtrak Mot. 7-8, Jan. 17, 2025.) According to Amtrak, it anticipated that UP would consult with Amtrak before disclosing this information, but UP instead unilaterally decided to disclose it. (Amtrak Mot. 3, Jan. 15, 2025; see also Amtrak Mot. 8, Jan. 17, 2025.) Amtrak states in its status report that it proposed a limited set of redactions to UP, but UP would not agree to these. (Amtrak Status Report 2; see also Amtrak Mot. 9, Jan. 17, 2025 (stating that it now proposes to more narrowly tailor the redactions).)

UP's Reply. In its January 21 reply, UP argues that disclosure was appropriate because there is no confidentiality agreement or other legal provision that requires it to keep the information confidential. (UP Reply 2-3, Jan. 21, 2025.) It asserts that under the terms of the protective order, it is permitted to disclose publicly information that it has the right to disclose, even if another party has designated it as Confidential or Highly Confidential. (*Id.* at 2.) According to UP, it previously made its position regarding the lack of confidentiality of this

information known to Amtrak in a 2023 non-disclosure agreement that Amtrak signed. (*Id.* at 3.) UP also argues that Amtrak has shared with UP the same information from other railroads, countering Amtrak's assertion that the information is competitively sensitive. (*Id.* at 4.) UP asserts that if Amtrak wishes to pursue a claim that UP's disclosure violated an agreement with Amtrak, Amtrak can seek relief under that agreement. (*Id.*)

UP also disputes several of Amtrak's assertions. First, UP argues that the fact that other rail carriers treat corresponding information as confidential is irrelevant because it does not bear on UP's right to disclose the information at issue. (*Id.* at 5 n.11.) Second, it asserts that Amtrak's claim that it has protected the information in question as confidential when subject to FOIA requests is inaccurate and cites to an instance where Amtrak disclosed corresponding information from another carrier as part of a National Transportation Safety Board investigation. (*Id.* at 6.) UP also questions the scope of Amtrak's proposed redactions. It argues that those redactions are inconsistent with Amtrak's disclosure or redactions of corresponding information in other instances; that some of the information is not commercially sensitive; and that some of the information was publicly disclosed by UP in a Federal Railroad Administration proceeding. (*Id.* at 6-8 (citing Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry. Co., Docket No. FD 35743 and UP Comments, June 1, 2020, Metrics & Minimum Standards for Intercity Passenger Rail Serv., FRA-2019-0069).)

Subsequent Action. On January 29, 2025, a decision was served explaining that Amtrak's status report, Amtrak's motion for further relief, and UP's reply to Amtrak's motions, had not yet been posted to the publicly available docket. Complaint & Pet. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak's Sunset Ltd. Trains 1 & 2, NOR 42175, slip op. at 1 (STB served Jan. 29, 2025). Although the parties submitted public versions of their Highly Confidential filings in accordance with the Board's regulations and the protective order, the decision stated that the public versions of the filings would be held temporarily to avoid the potential for inadvertent disclosure of information regarding the substance of Amtrak's motions. *Id.* at 2.³

DISCUSSION AND CONCLUSIONS

The Board will grant Amtrak's motion in part, on an interim basis, to allow the parties the opportunity to resolve their dispute in an appropriate forum. The protective order states that "[a]ny party producing information, data, documents, or other material (hereinafter collectively

³ Between January 19, 2025, and January 21, 2025, the Board received nine reply filings from non-parties to the investigation, in accordance with the established procedural schedule. See Complaint & Pet. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak's Sunset Ltd. Trains 1 & 2, NOR 42175 (STB served Aug. 19, 2024). The Board initially did not publicly post the non-party replies and ordered parties to review the filings and inform the agency by January 31, 2025, whether and to what extent those replies implicated the issue raised in Amtrak's motion. Amtrak and UP filed Highly Confidential responses on January 30, 2024, both indicating that they do not believe the non-party reply statements implicate the issues raised in Amtrak's motion. Accordingly, the Board released the non-party replies to the public docket.

referred to as ‘material’) to the Board or in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as ‘CONFIDENTIAL.’” (Protective Order, App. A, ¶ 2.) However, Paragraph 11 of the protective order states: “Information that is publicly available or obtained outside of this proceeding from a person with a *right to disclose it publicly* shall not be subject to this Protective Order even if the same information is produced and designated as ‘CONFIDENTIAL’ or ‘HIGHLY CONFIDENTIAL’ in this proceeding.” (Protective Order, App. A, ¶ 11 (emphasis added).)

It is uncontested that UP obtained the subject information outside of this proceeding. The question is whether UP has the “right to disclose it publicly.” Despite the absence of an express confidentiality provision covering the subject information, Amtrak nonetheless contends that UP is required to keep the information confidential based, in large part, on it and UP’s past conduct. Resolution of that issue could extend well beyond the scope of this proceeding and is appropriate for a court or other forum to decide (including through arbitration). See Gen. Ry. Corp.—Exemption for Acquisition of R.R. Line—in Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007) (explaining that the Board is not the proper forum to resolve disputes involving questions of state contract and property law); see also Ballard Terminal R.R.—Pet. for Declaratory Ord., FD 36261, slip op. at 4 (STB served June 27, 2019).⁴ Accordingly, if Amtrak wishes to pursue its argument that UP does not have the right to publicly disclose the subject information, it must seek resolution in an appropriate forum. The Board will allow Amtrak until March 13, 2025, to initiate an action for resolution in an appropriate forum.

Amtrak shall file a status update by March 14, 2025, to notify the Board whether it sought such resolution. If Amtrak has not initiated such an action, the Board will treat that as an abandonment or waiver of the claim that the protective order restricts UP’s ability to publicly disclose the information that is the subject of Amtrak’s motion in this proceeding. UP’s December 23 reply brief will be added back to the public docket without Amtrak’s proposed redactions. If, however, Amtrak initiates an action, UP will, by March 17, 2025, submit a public version of its December 23 reply brief with the information contained in Table 1 of Amtrak’s January 17 motion redacted, subject to further order as necessary. The parties shall submit joint status updates to the Board every 30 days during the pendency of the action. Any action regarding this confidentiality dispute will not operate to stay, or otherwise delay, the proceeding before the Board. Within three days of the conclusion of any such action, the parties must notify the Board of the outcome.

Under the procedural schedule, railroad rebuttals to non-party replies and Amtrak’s comprehensive rebuttal (to railroad replies and non-party replies) are due on February 21, 2025. Because a final decision on Amtrak’s motion will not be available before that date, the railroad and Amtrak rebuttals will not be posted to the publicly available docket until the Board directs otherwise. Amtrak and UP shall review the rebuttals and inform the Board by February 25, 2025, whether and to what extent those rebuttals implicate the issue raised in Amtrak’s motions.

⁴ Indeed, as UP notes, an alternative forum appears to be available. (UP Reply 4.)

The Board will rule on Amtrak's request to have the parties delete all copies of UP's reply when the Board issues a final decision on Amtrak's motion.

It is ordered:

1. Amtrak's motion for further relief is granted in part, on an interim basis, to allow the parties the opportunity to resolve their dispute in an appropriate forum.
2. The public version of Amtrak's motion for further relief and the public version of UP's reply to Amtrak's motions shall be posted to the publicly available docket.
3. Amtrak shall notify the Board by March 14, 2025, if it has initiated action in another forum regarding the confidentiality of the information at issue.
4. If Amtrak has initiated an action in another forum, UP shall submit a public version of its December 23 reply brief with the information contained in Table 1 of Amtrak's January 17, 2025 motion redacted by March 17, 2025. The parties shall also submit status updates to the Board every 30 days during the pendency of the action.
5. Within three days of the conclusion of any action in another forum, the parties shall notify the Board of the outcome.
6. Rebuttal filings will not be posted to the publicly available docket until the Board directs otherwise.
7. Amtrak and UP shall inform the Board by February 25, 2025, whether and to what extent the non-party replies implicate the issue raised in Amtrak's motion. Such filings must be submitted as Highly Confidential.
8. This decision is effective on its date of service.

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