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Via E-Filing

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

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Office of Proceedings
February 15, 2024
Part of
Public Record

Re: Docket No. EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service—Railroad Reporting*

Dear Ms. Brown:

Pursuant to the Surface Transportation Board’s January 31, 2024 Decision, Union Pacific Railroad Company is submitting monthly employment data through January 31, 2024. On February 14, 2024, Union Pacific filed a Motion for Protective Order in the above-referenced docket. For the reasons described below, Union Pacific is designating the January 2024 employment data as “Confidential” under that protective order and with the expectation that the Board will treat this employment data as Confidential. Union Pacific further notes that these monthly employment data constitute confidential commercial information, which are exempt from public disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4).

Employment Data Requested

The January 31, 2024 Decision directed Union Pacific “to continue to submit monthly employment data in this docket, as described in Item 8” in the Board’s May 6, 2022 Decision.¹

¹ Item 8 requires Union Pacific to provide the following information:

For each category of employees covered in the Monthly Report of Number of Railroad Employees (Form C) submitted to the Board’s Office of Economics under 49 C.F.R. § 1246.1: (i) total employee count; (ii) how many employees were added; (iii) how many employees were separated (with a breakout of those employees who separated by voluntary resignation); (iv) how many employees have been furloughed but are potentially available for recall; (v) the number of “extra-board employees”; and (vi) for categories 300, 400, 500, and 600, how many employees are working in active service (as opposed to completing training courses). Carriers should report these

The Board also directed Union Pacific “to continue to submit data about trainees in their monthly employment data” as first required in the Board’s June 13, 2022 Decision.²

Confidentiality Designation Under Proposed Protective Order

The employment data requested by the Board satisfies the “Confidential” definition in the proposed protective order because it “reflects proprietary or confidential information.” Motion for Protective Order, Docket No. EP 770 (Sub-No. 1) (STB filed Feb. 15, 2024), at 4.

The Board commenced the proceeding in Docket No. EP 770 to address service issues across the U.S. rail network, and Union Pacific has been providing employment data to the Board on a monthly basis since May 2022 in this subdocket to assist the Board in monitoring progress toward resolving those service issues. As explained in the attached Verified Statement of Diana M. Prauner, a competitor could use Union Pacific’s employment data to glean trends about where Union Pacific is devoting resources “to retain business, support new business, and improve service.” *Id.* ¶ 4. Although Union Pacific makes system-wide employee data publicly available, it protects from disclosure employee data on an operating division level in the ordinary course of business to remain competitive with other railroads and trucking companies. For these reasons, Union Pacific is designating the monthly employment data submitted for January 2024 as Confidential.

Union Pacific is only designating the requested employment data as “Confidential.” The Confidential designation means that interested parties may obtain the information by executing the Confidential Material Undertaking, whereby they would agree to keep Union Pacific’s employment data confidential and only use that data only for purposes of this oversight proceeding. In the event a competitor requested access to this employment data, Union Pacific reserves the right to redesignate the data as Highly Confidential.

data for each railroad operating division to the maximum extent practicable, and should also report these data on a system-wide basis.

May 6, 2022 Decision, Docket No. EP 770 (Sub-No. 1), at 7.

² Specifically, the Board required the following trainee-related data:

The Carriers must also report data about trainees and employee absences. The Carriers will now be required to include, in their monthly employment data and service recovery plans: (i) how many trainees entered training; (ii) how many trainees dropped out of training; (iii) how many trainees completed training; and (iv) how many trainees are currently in training. Carriers should report the data for each railroad operating division to the maximum extent practicable in addition to reporting on a system-wide basis.

June 13, 2022 Decision, Docket EP 770 (Sub-No. 1), at 7–8.

SIDLEY

Union Pacific Employment Data

February 15, 2024

Page 3

FOIA

For the same reasons Union Pacific has designated the monthly employment data for January 2024 as Confidential under the proposed protective order, Union Pacific's monthly employment data for January 2024 are also exempt from public disclosure under FOIA because the data are commercial information (CCI), which are protected under FOIA Exemption 4.

1. Legal Background

FOIA Exemption 4 exempts from public disclosure information that is either a trade secret or CCI, which the statute defines as information that is (1) "commercial or financial," (2) "obtained from a person," and (3) "privileged or confidential." 5 U.S.C. § 552(b)(4); *see also Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

Regarding the first prong, the terms "commercial" and "financial" in Exemption 4 are "'construed broadly.'" *Soghoian v. OMB*, 932 F. Supp. 2d 167, 174 (D.D.C. 2013) (quoting *COMPTTEL v. FCC*, 910 F. Supp. 2d 100, 115 (D.D.C. 2012)). "'[I]nformation is commercial under [Exemption 4] if, in and of itself, it serves a commercial function or is of a commercial nature.'" *Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 99 (D.D.C. 2013) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002)).

Regarding the second prong, "[t]here is no doubt that a corporation may be considered a 'person' for the purposes of Exemption 4." *Pub. Citizen Health Rsch. Grp. v. NIH*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002); *Comstock Int'l (U.S.A.), Inc. v. Exp.-Imp. Bank of U.S.*, 464 F. Supp. 804, 806 (D.D.C. 1979) (similar). Union Pacific thus qualifies as a "person" for these purposes.

Regarding the third prong, the Supreme Court held in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), that information can be considered "confidential" under two conditions. First, information can be considered confidential "whenever it is customarily kept private, or at least closely held, by the person imparting it." *Id.* at 2363 (citing Webster's Third New International Dictionary 476 (1961) and Black's Law Dictionary 370 (rev. 4th ed. 1968)). Second, information might be considered confidential "only if the party receiving it provides some assurance that it will remain secret." *Id.* The Court explained that the first of these conditions must be met, but the Court declined to address whether the second condition (*i.e.*, an assurance of confidentiality) is also required. *Id.* ("[T]here's no need to resolve that question in this case because the retailers before us clearly satisfy this condition too."). To the extent that earlier decisions of lower courts held that FOIA Exemption 4 could only be applied in cases where the release of the subject information might cause "substantial competitive harm," the Court overruled those decisions. *Id.* at 2360, 2363–66.

Under the FOIA Improvement Act of 2016, agencies are allowed to withhold information under the FOIA exemptions "only if the agency reasonably foresees that disclosure would harm

SIDLEY

Union Pacific Employment Data

February 15, 2024

Page 4

an interest protected by an exemption” or “disclosure is prohibited by law.” 2 U.S.C. § 552(a)(8)(A)(i). However, courts applying the foreseeable harm requirement in the context of Exemption 4 have held that it was not intended to resurrect the “substantial competitive harm” showing that courts sometimes required before the Court rejected this approach in *Argus Leader*. To the contrary, in the context of Exemption 4, “the relevant protected interest is that of the information’s *confidentiality*—that is, its private nature” and “[d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance.” *Am. Small Bus. League v. Dept. of Defense*, 411 F. Supp. 3d 824, 835–36 (N.D. Cal. 2019) (confirming that the foreseeable harm standard applies to Exemption 4, but declining to “effectively reinstate the competitive harm test for Exemption 4” that the Court rejected in *Argus Leader*).

2. Discussion

Here, the monthly employment data are exempt from public disclosure in their entirety because they constitute confidential commercial information set forth in FOIA Exemption 4.

The monthly employment data plainly satisfy the first and second prongs of the CCI test. The data are commercial because these data were generated as part of Union Pacific’s for-profit business operations and Union Pacific uses these data in its business. *See Pub. Citizen*, 975 F. Supp. 2d at 99 (characterizing information as “commercial” where it “serves a commercial function or is of a commercial nature”). The data are similarly “obtained from a person” because corporations such as Union Pacific are considered persons for purposes of Exemption 4. *See Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996); *Pub. Citizen Health Rsch.*, 209 F. Supp. 2d at 44.

It is equally plain that the monthly employment data qualify as “confidential” under the two-part test in *Argus Leader*. Union Pacific customarily and actually treats these monthly employment data as private information of the company. Union Pacific does not release these data outside of the company in the absence of a non-disclosure agreement or when required by a legal mandate. The data are closely held within the company, and all employees of the company who have access to these data are required by the terms of their employment agreements with Union Pacific to maintain the confidentiality of all commercially sensitive company data, including, but not limited to, the monthly employment data that Union Pacific is submitting today. Further, Union Pacific has a reasonable expectation based on past practice that the Board will issue a protective order in this proceeding.

For a short period in 2022–2023, Union Pacific did not object to the public release of its monthly employment data by the Board, but that was a temporary practice, which was informed by unique and transitory market considerations that are no longer in effect. Releasing the *current* data to the public or a competitor would cause substantial competitive harm to Union Pacific, since a savvy competitor could use these data to discern trends regarding where Union Pacific is making strategic investments in developing new business opportunities and improving service. In light of the risk of competitive harm in the current business environment, Union Pacific does

SIDLEY

Union Pacific Employment Data

February 15, 2024

Page 5

not and would never voluntarily choose to release these disaggregated employment data to the public, let alone competitors.

Accordingly, the January 2024 employment data meet all of the criteria that are necessary to qualify for protection under FOIA Exemption 4, and they should be withheld from public release. If the Board declines to grant Union Pacific's Motion for Protective Order or determines that these materials are not exempt from public disclosure under FOIA Exemption 4, Union Pacific respectfully requests that the Board provide sufficient opportunity for Union Pacific to respond before making any portion of the January 2024 employment data public.

Respectfully submitted,

/s/ Raymond A. Atkins

Raymond A. Atkins, Ph.D.

Counsel for Union Pacific Railroad Company

Attachments

cc: James Boles, Vice President – Law
Union Pacific Railroad Company

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 770 (Sub-No. 1)

URGENT ISSUES IN FREIGHT RAIL SERVICE—RAILROAD REPORTING

**VERIFIED STATEMENT OF
DIANA M. PRAUNER**

My name is Diana M. Prauner. I am the Assistant Vice President of Accounting for Union Pacific Railroad Company, a position I have held since July of 2022. I began my career with Union Pacific in 2003 and have held management positions in Union Pacific's Finance and Accounting Departments. Before I was promoted to my current position, I served as General Director of Revenue Accounting.

I am submitting this statement to accompany Union Pacific's production of monthly employment data required by the Surface Transportation Board's January 2024 Decision. The following numbered statements are based on my direct and personal understanding:

1. The monthly employment data submitted by Union Pacific in compliance with the January 2024 Decision is Union Pacific's proprietary and confidential information.
2. The monthly employment data is not information that is otherwise made publicly available by Union Pacific or disclosed publicly in the ordinary course of business.
3. Unlike the aggregated employment information reported by Union Pacific on Wage Forms A & B, and Form C, the monthly employment data submitted in compliance with the January 2024 Decision is detailed information identifying regional location and employment status.

4. Detailed employment data can identify trends and patterns that can be used to expose Union Pacific's otherwise non-public business plans for resources to retain business, support new business, and improve service.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on February 15, 2024.

Diana M. Prauner
Diana M. Prauner

REDACTED – TO BE PLACED ON PUBLIC FILE

**Attachment Contains
Confidential Information**