

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

**CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY
COMPANY'S RESPONSE TO AMTRAK'S MOTION TO ALLOW
PUBLIC FILING OF ALL REPLY EVIDENCE**

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INTRODUCTION

The National Passenger Railroad Corporation (“Amtrak”) has requested that the Surface Transportation Board (“Board”) enter an order allowing Amtrak to refile the entire highly confidential version of its Reply Argument and Evidence as public without redactions. Amtrak frames its Motion to Allow Public Filing of All Reply Evidence as a request to disclose data concerning the movement of trains on CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”).¹

Amtrak’s Motion focuses primarily on “historical train operating data, train movement data, train counts, and track drawings” quoted and cited to in the Verified Statement of L.E. Peabody & Associates, Inc.² Its motion does not mention (but would encompass) images of the 2021 Gulf Coast RTC Model that depict train identification information and movements along the host railroads’ networks.³ Amtrak wrongly asserts that public disclosure of these materials “would not cause serious competitive harm to CSX or NS,” claiming that (1) this information is supposedly publicly observable and (2) any economic or competitive harm is “purely speculative.”

¹ Amtrak’s Motion to Allow Public Filing of All Reply Evidence, Ex. C at 2, *Application of the National Passenger Railroad Corporation Under 49 U.S.C. § 24308(e)—CSX Transportation, Inc. and Norfolk Southern Railway Company*, STB Docket No. FD 36496 (filed Dec. 3, 2021) (“Amtrak’s Motion”).

² Amtrak’s Motion at 3.

³ See, e.g., Amtrak Reply Evidence, Ex. 3 – Verified Statement of L. E. Peabody & Associates, Inc. at 49.

Federal law and Board precedent clearly establish that train data is commercially sensitive material that warrants the highest form of confidentiality protection. While CSXT and NSR have explained this precedent to Amtrak, it offers no response to it. The train data Amtrak seeks to broadcast to the world contains sufficient information to determine traffic volumes and routes of various commodities to specific shipper locations. This is competitively sensitive information for those shippers (who operate in competitive industries) and to CSXT and NSR (who compete with alternative transportation providers like trucks). This train data is voluminous and detailed, such that no lay observer could ever hope to collect it through in-person track observation. And Amtrak's status as a non-competitor is irrelevant when the request is to share this train data publicly without restriction. And remarkably, Amtrak offers no reason why it needs to make public this competitively sensitive information. Its outside counsel and consultants have full access to the entire evidence and workpapers, and Amtrak has not identified any prejudice that it has suffered.

Indeed, Amtrak's reply evidence contains other categories of Confidential or Highly Confidential information that go unaddressed in Amtrak's Motion. These categories include the Data Sharing and RTC Study Agreements⁴; a 2020 Federal

⁴ See Amtrak's Reply Argument and Evidence, Ex. 2 – Verified Statement of Amtrak Assistant Vice President Host Railroads Jim Blair, App'x G, *Application of the National Passenger Railroad Corporation Under 49 U.S.C. § 24308(e)—CSX Transportation, Inc. and Norfolk Southern Railway Company*, STB Docket No. FD 36496 (filed Dec. 3, 2021) ("Amtrak Reply Evidence").

Railroad Administration grant agreement⁵; and letters between the parties that contain personally identifying information and details of Confidential terms from the Data Sharing Agreement, the RTC Study agreements, and the host railroads' respective operating agreements with Amtrak.⁶ Amtrak's failure to justify the public disclosure of these materials is grounds enough to deny the Motion.

I. Amtrak Has Identified No Prejudice That Justifies Public Disclosure.

Amtrak does not assert that it has suffered any harm from CSXT's and NSR's designation of train data as Highly Confidential. Nor could it. Amtrak's outside counsel and consultants have full access to all the evidence, workpapers, and discovery record.

The Board typically considers the burden to the objecting party when reviewing confidentiality designations and protective orders, often concluding that the burden of hiring outside counsel is "outweighed by . . . legitimate confidentiality concerns."⁷ Here, there is no burden at all. Amtrak has retained outside counsel and consultants who have access to all the materials in question and who have addressed some of this data in Amtrak's Reply Evidence. There is no cause to consider a motion by a party that has literally identified no harm from the action about which it complains.

⁵ *Id.* at App'x H.

⁶ *Id.* at App'x I, K, and O. Appendix K contains incremental cost terms from the parties' operating agreements. *Id.* at App'x K at 4, 8.

⁷ *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC 104, at 3 (served May 10, 2000).

II. Federal Law and Board Precedent Prohibit the Public Disclosure of Train Data.

The Board has long recognized that the “unrestricted disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury.”⁸ The Highly Confidential designation exists to afford parties—through outside counsel and experts—the opportunity to obtain relevant information in a dispute before the Board, while also ensuring that commercially sensitive material “will be used in connection with th[at] proceeding and not for any other business or commercial purpose.”⁹ The Highly Confidential designation exists for good reason: “In-house counsel has obligations to his employer and has interests as an employee which necessarily jeopardize the confidentiality of a competitor’s commercially sensitive information entrusted to him. The obligations of outside counsel to the complainant are far more narrowly circumscribed.”¹⁰

Federal law and Board precedent protect from public disclosure documents, data, and information that reflect the movement of trains and railcars on a rail carrier’s network. Rail carriers are prohibited from disclosing—“without the consent of the shipper or consignee”—information concerning “the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation.”¹¹ As CSXT and NSR have explained to Amtrak, this

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.* (citation omitted).

¹¹ 49 U.S.C. § 11904(a)–(b).

category of information includes “OS data, train profile data, dispatch data, operating plans, and actual train movement data. This data could be used to determine the identity and location of CSXT [or NSR] customers, to obtain customer-specific traffic information such as car volumes, and to analyze CSXT’s [or NSR’s] business and operations strategy.”¹² Because of its commercially sensitive nature, this category of information is routinely designated as Highly Confidential in Board proceedings.¹³ Notably, the Board commented in this proceeding that the parties’ disagreement over Amtrak’s access to CSXT and NSR train data and other commercially sensitive information during the 2020 RTC Study “appears to involve information that would typically be shared, *pursuant to a protective order*, in a Board proceeding.”¹⁴ CSXT directed Amtrak to this precedent in correspondence

¹² Amtrak’s Motion, Ex. C at 2.

¹³ See, e.g., *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Docket No. FD 33388, Decision No. 1 at 1, 4 (served Apr. 16, 1997) (noting that exchange of “traffic data and tapes” could implicate 49 U.S.C. § 11904 and approving highly confidential designation); *Capital Materials Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Company*, STB Docket No. NOR 42068, at 5, 8 (served Apr. 19, 2002) (highly confidential designation included “traffic data” and “other competitively sensitive information,” and was appropriate because “disclosure of confidential, proprietary, or commercially sensitive material could cause serious competitive injury”).

¹⁴ Decision at 11, *Application of the National Passenger Railroad Corporation Under 49 U.S.C. § 24308(e)—CSX Transportation, Inc. and Norfolk Southern Railway Company*, STB Docket No. FD 36496 (served Aug. 6, 2021) (emphasis added).

during the course of this proceeding,¹⁵ but Amtrak never responded. And Amtrak fails to even acknowledge this precedent in its Motion.¹⁶

III. Train Data Is Commercially Sensitive and Not Publicly Available or Observable.

Amtrak claims that the information contained in these data sources is “already available [to] the public.”¹⁷ Specifically, Amtrak suggests that anyone “station[ed] along CSX’s or NS’s railroad lines could easily record” “[t]rain movements, types of trains, [and] the number of cars on a train.”¹⁸ This argument is ridiculous on its face.

Railroads maintain a variety of train movement data sources. These sources aggregate train movements on rail networks that span dozens of states and tens of thousands of miles.¹⁹ The information contained in these data sources far exceeds the information that can be obtained through trackside observation. For example, train profile data depicts not only the number of cars, but also the crew change frequency and location, the train’s size and name which often contains information about the route and the train’s activity, the train type and class which reveals the

¹⁵ See Amtrak’s Motion, Ex. C at 1–3.

¹⁶ See generally *id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ CSXT operates trains over 20,000 route miles in 23 states, the District of Columbia, and two Canadian provinces. Company Overview, CSX Transportation, Inc., <https://www.csx.com/index.cfm/about-us/company-overview/>. Likewise, NSR operates trains over 19,300 route miles in 22 states and the District of Columbia. Corporate Profile, Norfolk Southern Railway Company, <http://www.nscorp.com/content/nscorp/en/about-ns/corporate-profile.html>.

commodities being transported, dwell time, and the schedule.²⁰ OS Data contains train movements by control points, the direction the train is moving, the time the train passes each control point, and the train's identifying information.²¹ CSXT's OS data for the Gulf Coast corridor from October to November 2019 alone contained nearly 62,000 data entries.²² And dispatch data is even more granular than OS data as it provides train movement detail at the track circuit level rather than only for control points.²³ Here, CSXT provided dispatch data over a four-month period in 2019, consisting of more than 232,000 data entries.²⁴

This detailed data is extremely valuable. Armed with this information, a third party could determine the identity and location of CSXT or NSR customers as well as the car volumes and commodities going to and from each customer. This could cause competitive harm to CSXT's and NSR's customers, whose competitors could obtain information about facilities served by CSXT and NSR. And it could cause competitive harm to CSXT and NSR, who compete against each other and against alternative transportation providers like trucks. (As CSXT and NSR have explained to Amtrak, CSXT's highly confidential train information was not shared

²⁰ See 2021 Gulf Coast RTC Study Workpaper, CSXT Inputs, "Train Profile Data.xlsx."

²¹ A control point is every location on the track where a train may continue moving straight or diverge onto another route. By way of example, each end of a siding constitutes a separate control point.

²² See *id.* at CSXT Inputs, "OS DATA.xlsx."

²³ See *id.* at CSXT Inputs, "DispatchData.xlsx."

²⁴ See *id.*

with in-house NSR personnel, and NSR's highly confidential train information was not shared with in-house CSXT personnel.) An individual could diligently monitor a single point on a rail carrier's network and still have a woefully incomplete picture of the railroad's operations on that corridor. The Capacity Modeling Guidebook for Shared-Use Passenger and Freight Rail Operations correctly notes that:

Observations of rail traffic, to discern patterns to fluctuations, are impractical given the nature of around-the-clock rail operations, seasonality, and cyclicity inherent in rail traffic. One day observations are essentially meaningless. Rail planners, accordingly, rely on rail traffic data from the corridor's owning railroad that spans several days, weeks, or even a month or a year in order to capture the true nature of the line operations.²⁵

But of course, Amtrak already knows this. After all, Amtrak chose to obtain this very same train data from CSXT and NSR in discovery rather than collect the data needed to conduct an operations modeling study of the 144-mile Gulf Coast corridor through its own trackside observation. There is no question that this train data is commercially sensitive, and the Board should reject Amtrak's disingenuous argument that it is publicly available.

Moreover, making train data publicly available poses a grave security threat to the railroads. Disclosing to the public granular data about exact train

²⁵ FOX, JUSTIN, ET AL., CAPACITY MODELING GUIDEBOOK FOR SHARED-USE PASSENGER AND FREIGHT RAIL OPERATIONS 11 (NCHRP Report 773, Transp. Research Bd., Editor 2014).

movements, commodities (including hazardous materials), schedules, and customers could render trains more vulnerable to attack.

IV. CSXT and NSR Need Not Wait For Harm to Occur to Designate Train Data Highly Confidential.

Amtrak next suggests that any potential economic or competitive harm stemming from the disclosure of commercially sensitive train data is “purely speculative.”²⁶ But CSXT and NSR are not required to wait until harm materializes before designating material Highly Confidential. The Board routinely grants protective orders because the “unrestricted disclosure of confidential, proprietary, or commercially sensitive material *could cause serious competitive injury*.”²⁷ The purpose of protective orders is to prevent injury *before* it occurs.

Amtrak also seems to suggest that there is no risk of harm because Amtrak “does not seek to determine any information about CSX and NS customers.”²⁸ That argument is a nonstarter because Amtrak is seeking the *public* disclosure of train data, not simply that the train data be made Confidential so that Amtrak personnel may view it.

²⁶ Amtrak’s Motion at 3.

²⁷ *Trailer Bridge*, STB Docket No. WCC 104, at 2 (emphasis added).

²⁸ Amtrak’s Motion at 3.

CONCLUSION

For all of these reasons, the Board should deny Amtrak's Motion to allow the public disclosure of any portion of CSXT's and NSR's commercially sensitive train data.

Respectfully submitted,

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Dated: December 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2021, a copy of the foregoing Response to Amtrak's Motion to Allow Public Filing of All Reply Evidence was served by email or first class mail on the service list to Finance Docket No. 36496.

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