

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36496

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

Digest:¹ This decision (1) grants a request to intervene in this proceeding filed by the Alabama State Port Authority and its rail common carrier operating division, Terminal Railway Alabama State Docks, (collectively, the Port); (2) denies as moot the National Railroad Passenger Corporation's (Amtrak's) motion for clarification of the Port's status in the case; (3) denies as moot Amtrak's motion to strike the Port's reply evidence; (4) denies Amtrak's request to file its reply evidence publicly, without redactions or a confidential designation; and (5) denies as moot Norfolk Southern Railway Company's motion to have Amtrak add confidentiality designations and refile its reply evidence.

Decided: January 27, 2022

On March 16, 2021, the National Railroad Passenger Corporation (Amtrak) filed an application with the Board, pursuant to 49 U.S.C. § 24308(e), seeking an order requiring CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR)² to allow Amtrak to operate additional intercity passenger trains, consisting of two round-trips per day, over the rail lines of CSXT and NSR between New Orleans, La., and Mobile, Ala. (Gulf Coast Service). Amtrak also requested that the Board issue an interim order requiring CSXT and NSR to provide Amtrak with access to their rail lines between New Orleans and Mobile in order to perform all necessary preparations for Gulf Coast Service to commence.

By decision served April 14, 2021, a joint motion for protective order filed by CSXT, NSR, and Amtrak was granted. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. & Norfolk S. Ry., FD 36496 (STB served Apr. 14, 2021).

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 Although Amtrak names Norfolk Southern Corporation in its application, it appears that NSR is the proper party. (See Mot. to Dismiss 1 n.1.)

By decision served August 6, 2021, the Board, among other things, denied CSXT and NSR's motion to dismiss the application, adopted a procedural schedule, and appointed Administrative Law Judge Thomas McCarthy to handle all discovery matters and resolve initially all discovery disputes. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. & Norfolk S. Ry., FD 36496 (STB served Aug. 6, 2021). The Board also denied as moot Amtrak's request for interim access to CSXT and NSR's rail lines between New Orleans and Mobile because it appeared Amtrak had received from CSXT and NSR the limited access it had sought. See id. at 11.

On October 20, 2021, Amtrak filed a motion seeking clarification that the Alabama State Port Authority and its rail common carrier operating division, Terminal Railway Alabama State Docks, (collectively, the Port) are not parties to this proceeding and not entitled to present evidence or argument without seeking leave of the Board.³ On November 3, 2021, the Port replied, arguing that it is a party and is entitled to present evidence. (Port Reply 1, Nov. 3, 2021.) The Port argues, however, that if the Board accepts Amtrak's contention that the Port is not a party, the Port requests leave to intervene in this proceeding.⁴ (Id. at 2.)

Concurrent with the filing of its reply evidence, on December 3, 2021, Amtrak also filed a motion seeking leave to file its reply evidence publicly, without redactions or the filing of a confidential version. (Amtrak Mot. 1, Dec. 3, 2021.) Amtrak challenges CSXT and NSR's designation of certain train movement data as highly confidential. (Id.) According to Amtrak, because of such highly confidential designations, it was required to redact large portions of the verified statements included with its reply evidence. (Id.) On December 23, 2021, CSXT and NSR replied, arguing that the train movement data Amtrak cites is commercially sensitive and was properly designated as highly confidential. (CSXT & NSR Reply 2-9, Dec. 23, 2021.)

On December 6, 2021, Amtrak filed a motion to strike the Port's reply evidence, again arguing that the Port is not a party and is therefore not entitled to present evidence. (Amtrak Mot. 1, Dec. 6, 2021.) The Port's rebuttal evidence, filed on December 23, 2021, included a reply to Amtrak's motion, in which the Port again states that it is already a party but reiterates its request to intervene, if necessary. (Port Rebuttal 2-5.) On December 27, 2021, CSXT and NSR filed a reply, arguing that the Port has met the Board's standard for intervention. (CSXT & NSR Reply 6-8, Dec. 27, 2021.)

³ Also on October 20, 2021, Amtrak filed a renewed request for an interim order, asserting that "CSX[T] has been unwilling to resolve a particular access issue"—specifically, Amtrak's request for access to conduct an engineering survey of CSXT's Choctaw Yard as a site for temporary layover track for the Gulf Coast Service. (Amtrak Request for Interim Ord. 2, Oct. 20, 2021.) By decision served November 29, 2021, Amtrak's renewed request for an interim access order was granted. See Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. & Norfolk S. Ry., FD 36496 (STB served Nov. 29, 2021).

⁴ As CSXT, NSR, Amtrak, and the Port were filing the various motions and replies thereto described above, they also filed evidence and arguments on the merits. CSXT, NSR, and the Port filed opening evidence on November 3, 2021; Amtrak and the Port filed reply evidence on December 3, 2021; and on December 23, 2021, CSXT, NSR, and the Port filed rebuttal evidence.

On December 8, 2021, NSR filed a motion asking the Board to direct Amtrak to refile its reply evidence. NSR argues that Amtrak did not indicate that the document containing its reply evidence included highly confidential information. (NSR Mot. 1, Dec. 8, 2021.) NSR states that Amtrak did not properly designate confidential and highly confidential information in the confidential version of its reply evidence by using single brackets and double brackets, respectively, as NSR argues is customary in Board proceedings. (*Id.*) Finally, NSR asserts that the public and confidential versions of Amtrak’s reply evidence are not identical and therefore were slowing NSR’s review and preparation of its rebuttal evidence. (*Id.* at 2.) On December 13, 2021, Amtrak replied, stating that, “in the spirit of cooperation,” it was submitting revised pleadings conforming to NSR’s requests. (Amtrak Reply 1-2, Dec. 13, 2021.)

In this decision, the Board resolves the outstanding motions in advance of a hearing in this proceeding, to be discussed in a forthcoming Board decision.

DISCUSSION AND CONCLUSIONS

The Port’s Request to Intervene. The Board finds that the Port satisfies the standard for intervention, as the issues it addresses are reasonably pertinent to, and do not unduly broaden, the issues already presented. See 49 C.F.R. § 1113.7(f); see also 49 C.F.R. § 1112.4. Therefore, the Board will grant the Port’s request to intervene. The Port clearly has an interest in this proceeding, given that it uses the CSXT mainline to switch freight traffic between the Port’s public seaport terminals and its yard on the other side of the CSXT mainline. Moreover, the Port has already filed evidence and argument, as described in footnote 4 above.

Although the Port submitted arguments and evidence prior to its request to intervene, the Board will accept all the Port’s evidentiary submissions in the interest of developing a complete record. See Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys., Utah, FD 36284, slip op. at 4 n.3 (STB served Dec. 15, 2021).

Furthermore, given that the Board is granting the Port’s request to intervene, Amtrak’s motion for clarification that the Port is not a party and Amtrak’s motion to strike the Port’s reply evidence will be denied as moot.

Amtrak’s Motion to Allow Public Filing of Reply Evidence. Amtrak states that it requested that CSXT and NSR revisit their designation of certain highly confidential materials, specifically maps and past timetables related to CSXT operations and data related to NSR rail operations. (Amtrak Mot. 2, Dec. 3, 2021.) Amtrak argues that the disclosure of this historical train operating data, train movement data, train counts, and track drawings would not cause serious competitive harm to CSXT or NSR, and any claim of competitive harm is purely speculative. (*Id.* at 3.) Amtrak claims that the information contained in the disputed materials is already available to the public, arguing that a person or camera stationed along CSXT or NSR’s rail lines could record this information by observing the trains as they move along the lines. (*Id.*)

In reply, CSXT and NSR argue that Amtrak has identified no prejudice that would justify public disclosure, since Amtrak’s outside counsel and consultants have access to the disputed materials under the protective order. (CSXT & NSR Reply 3, Dec. 23, 2021.) CSXT and NSR also argue that 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. (Id. at 4.) In addition, CSXT and NSR dispute Amtrak’s contention that this train movement data is already publicly available and observable and argue that this information is commercially sensitive because a third-party could use the information to determine the identity and location of CSXT’s or NSR’s customers, as well as the car volumes and commodities going to and from each customer. (Id. at 6-8.) Finally, CSXT and NSR argue that they need not wait for harm to occur before designating material as highly confidential. (Id. at 9.)

Amtrak, CSXT, and NSR filed the joint motion for protective order in this proceeding to “facilitate the submission of confidential and highly confidential information.” Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e), FD 36496, slip op. at 1 (STB served Apr. 14, 2021). The terms of the protective order provide that a party may designate as “highly confidential” material that it in good faith believes reflects competitively sensitive information and that any party may challenge such designation. See id., App. ¶ 2.

The Board finds that the train movement data at issue here is the class of information that the Board has previously allowed parties to designate as highly confidential pursuant to a protective order. See, e.g., Total Petrochemicals USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 3 (STB served June 23, 2010) (approving protective order defining highly confidential information as including shipper-specific rate, cost or traffic data, or other competitively sensitive information). The train movement data is also not publicly observable because, as CSXT and NSR state, railroads maintain a variety of train movement data sources, which far exceed what could be obtained through trackside observation. (See CSXT & NSR Reply 6, Dec. 23, 2021.) In addition, as CSXT and NSR state, the train movement data could be used to determine the identity and location of their customers, to obtain customer-specific information such as car volumes, and to analyze their business and operations strategy. (See id. at 4-5.)

Amtrak has also not demonstrated that it has been prejudiced by CSXT and NSR’s designation of the train movement data as highly confidential. See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760, slip op. at 6 (ICC served Oct. 27, 1995) (indicating that a party may challenge materials designated as highly confidential under a protective order if it can show the materials do not merit protection, and that it has been prejudiced in some way by the designation). Amtrak’s outside counsel and consultants had access to the highly confidential materials under the protective order in preparing Amtrak’s reply evidence. Moreover, the Board, in deciding whether to grant or deny Amtrak’s application in this proceeding, will have access to the complete record, including all materials designated as highly confidential, and will rely upon it to the extent necessary in reaching its decision. Amtrak has otherwise identified no compelling reason to permit it to file its reply evidence without redactions or a confidential version. Therefore, the Board will deny Amtrak’s motion to allow it to publicly file its reply evidence.

NSR's Motion to Direct Amtrak to Submit Revised Reply Evidence. On December 13, 2021, along with its reply to NSR's motion, Amtrak submitted a revised confidential version of its reply evidence, which designates confidential information with single brackets and highly confidential information with double brackets. In the rebuttal evidence filed on December 23, 2021, CSXT and NSR do not mention NSR's pending motion and do not argue that Amtrak's revised confidential version of its reply evidence impaired their ability to submit their rebuttal evidence. Therefore, because it appears that Amtrak voluntarily complied with NSR's request, the Board will deny NSR's motion as moot.

It is ordered:

1. The Port's request to intervene is granted, as discussed above.
2. Amtrak's motion for clarification that the Port is not a party is denied as moot.
3. Amtrak's motion to strike the Port's reply evidence is denied as moot.
4. Amtrak's motion to allow public filing of reply evidence is denied, as discussed above.
5. NSR's motion to direct Amtrak to submit revised reply evidence is denied as moot.
6. This decision is effective on its service date.

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