

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 modifies the protective order in this proceeding to allow certain Amtrak in-house personnel to access certain materials designated as “highly confidential.” The Board also orders Board-sponsored mediation and extends the deadline for filing supplemental evidence by 30 days, until July 13, 2022.

Decided: June 10, 2022

At the conclusion of the May 12, 2022 session of the evidentiary hearing in this case, the Chairman and other Board members discussed a number of evidentiary issues, invited the Parties² to submit additional evidence on those issues, and indicated that the hearing record would remain open until June 13, 2022, for that purpose. A decision served on May 17, 2022, confirmed that the hearing record would remain open until June 13, 2022, to allow the Parties to submit any additional evidence. See Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496 (STB served May 17, 2022).

On May 19, 2022, Amtrak filed a motion requesting that the Board order CSXT and NSR to redesignate all the materials produced in connection with the 2020 and 2021 Rail Traffic Controller (RTC) studies from “highly confidential” to “confidential,” so that Amtrak personnel can work with Amtrak’s outside consultants to submit to the Board additional RTC modeling. (Amtrak Mot. 1, May 19, 2022.) In the alternative, Amtrak requests that the Board modify the

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 Parties are the National Railroad Passenger Corporation (Amtrak), CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), and the Alabama State Port Authority and its rail carrier division, the Terminal Railway Alabama State Docks (collectively, the Port).

protective order served on April 14, 2021, to allow certain Amtrak personnel³ to access this highly confidential material after they sign the highly confidential undertaking pursuant to the protective order.⁴ (Amtrak Mot. 1, May 19, 2022.)

Amtrak states that, because CSXT and NSR have designated essentially all the materials related to the 2020 and 2021 RTC studies as “highly confidential,” those materials cannot be viewed by or discussed with anyone from Amtrak. (Id. at 1-2.) As a result, according to Amtrak, the Amtrak personnel most familiar with the Gulf Coast corridor and RTC modeling are unable to work on or direct any of the additional RTC modeling discussed by the Board. (Id. at 2.) Amtrak argues that it is unable to conduct RTC modeling in the same way that CSXT and NSR directed the 2021 RTC model, by sitting in the room with their RTC modelers and talking through various issues and scenarios, which places Amtrak at a significant disadvantage in attempting to respond to the Board’s discussions of additional RTC modeling. (Id.)

On May 31, 2022, CSXT and NSR replied in opposition to Amtrak’s motion. CSXT and NSR argue that the Board already ruled on Amtrak’s request to redesignate certain “highly confidential” materials, citing the Board’s decision served on January 28, 2022, which, among other things, denied Amtrak’s motion seeking leave to file its reply evidence publicly. (CSXT & NSR Reply 3-4, May 31, 2022); see also Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496, slip op. at 3-4 (STB served Jan. 28, 2022). CSXT and NSR question the need for Amtrak personnel to access highly confidential material and caution that allowing such access would “up-end” decades of Board precedent. (CSXT & NSR Reply 4-5, May 31, 2022.) According to CSXT and NSR, the Board’s ruling in the January 28, 2022 decision is the law of the case in this proceeding and resolves Amtrak’s May 19, 2022 motion. (Id. at 5-8.)

The Board will modify the protective order to allow certain Amtrak personnel to access select materials designated as “highly confidential,” provided those Amtrak personnel sign the undertaking for “highly confidential” material. Granting a limited number of Amtrak personnel access to a select subset of materials designated as “highly confidential”—subject, of course, to the applicable restrictions in the protective order pertaining to the use of “highly confidential” materials—is warranted under the circumstances here, as the Board agrees that, without such access, Amtrak will be at a significant disadvantage vis-à-vis CSXT and NSR in preparing and submitting additional evidence that is responsive to the evidentiary issues raised by the Board. Witnesses of CSXT and NSR testified to the importance of carrier personnel in making recommendations to outside modeling experts, addressing questions about train operations, validating the model and verifying that it represented reality, and having the “final say” on inputs. (Hr’g Tr. (Rough), vol. I, 203, Apr. 4, 2022; Hr’g Tr. (Rough), vol. IV, 1436, Apr. 8,

³ The seven individuals for whom Amtrak seeks access to the highly confidential materials are: Jim Blair, Kyle Montgomery, Doug Reisner, Jeff Gerlach, Davis Dure, John Rhodes, and Tim Wells. (Amtrak Mot. 6 n.2, May 19, 2022.)

⁴ In addition, Amtrak requests that the Board order CSXT and NSR to produce the additional RTC analyses that Mark Dingler testified he performed during the hearing on the record, as well as all supporting workpapers. (Amtrak Mot. 1, May 19, 2022.) CSXT and NSR oppose that request. (See CSXT & NSR Reply 8-11, May 31, 2022.)

2022; Hr’g Tr. (Rough), vol. VI, 2246, Apr. 14, 2022.) It is important that Amtrak be afforded a similar opportunity, especially given the Board’s encouragement that the Parties analyze and brief operational changes as a means of mitigating freight impacts.⁵ (Hr’g Tr. (Rough), vol. XI, 4061, 4063, May 12, 2022.) Such changes could involve matters that have been the subject of some disagreement among the Parties, (see e.g., Amtrak Reply, Ex. 1, Reply V.S. Crowley & Fapp 47-50, Dec. 3, 2021; CSXT & NSR Rebuttal, Ex. 1, Rebuttal V.S. Banks & Guthrie, Ex. A, RTC Modeling Rebuttal R. 12-14, Dec. 23, 2021), and input from Amtrak personnel may well be needed.⁶

The Board also does not share the freight carriers’ concern about up-ending precedent. This matter is the first and only proceeding to have been brought under 49 U.S.C. § 24308(e). Nor does the Board find compelling the carriers’ argument that these circumstances are distinguishable from those instances in merger proceedings where limited internal personnel have been given access to highly confidential information, and, in particular, their argument that, in those cases, “internal business personnel must be involved in the development of a real world operating plan that the Board expects will be submitted and implemented if the merger is approved.” (CSXT & NSR Reply 4 n.8, May 31, 2022.) The situation presented in those merger proceedings is not that dissimilar to the one presented here, where Amtrak (which is not a competitor for freight transportation) is seeking approval to add passenger trains over the line of a rail carrier, and where the key inquiry is whether Amtrak can *operate* those trains without impairing unreasonably the freight transportation of the host railroad. The Board disagrees with CSXT and NSR that Amtrak’s rationale for allowing a limited number of internal personnel to have access to certain highly confidential materials in the particular circumstances of this

⁵ The Board has no reason to question CSXT and NSR’s contention that at “no point in the process did CSXT internal personnel possess NSR’s train movement data or vice versa,” (CSXT & NSR Reply 7). The relevant point is not that the carriers could not access each other’s data, but that their jointly retained experts had the ability to communicate with personnel at *each* carrier to verify and validate RTC modeling assumptions and inputs. It is appropriate given the circumstances of this proceeding that Amtrak be afforded a similar opportunity.

⁶ CSXT and NSR contend that Amtrak has not explained why all seven individuals identified in Amtrak’s motion need access to the highly confidential data, particularly the raw data used to create the RTC inputs, and suggest that access to even a “single” Amtrak modeling expert is unnecessary. (CSXT & NSR Reply 4 n.8, May 31, 2022.) But CSXT and NSR’s own witnesses characterized the process by which carrier personnel worked with outside experts on RTC modeling as a “large-scale peer review,” with a “core” team of seven individuals, including four who worked for CSXT and NSR, supported by “others who joined particular calls.” (Hr’g Tr. (Rough), vol. I, 231-32, Apr. 4, 2022; Hr’g Tr. (Rough), vol. IV, 1420, Apr. 8, 2022.) Moreover, while CSXT and NSR criticize Amtrak’s inclusion of a “senior business executive like Jim Blair,” (CSXT & NSR Reply 4 n.8, May 31, 2022), their own internal RTC model review team included, among others, Ricky Johnson and Randall Hunt, CSXT’s Senior Vice President of Engineering and Mechanical and NSR’s Senior Director – Interline Services, respectively, (see CSXT & NSR Opening, Ex. 1, V.S. Johnson & Hunt 2, Nov. 3, 2021). Given these contradictions, CSXT and NSR have not provided an adequate basis for limiting access to a smaller number of Amtrak employees.

unprecedented case could be extended to “any number of cases before the Board.” (*Id.* at 5.) No other cases involve the unique issues raised in this proceeding under § 24308(e).

Moreover, Amtrak’s request is not governed by the law of the case doctrine, which applies only when an issue has been decided either explicitly or implicitly. Copart, Inc. v. Admin. Rev. Bd., 495 F.3d 1197, 1201 (10th Cir. 2007) (“We have explained that ‘[t]he doctrine [of law of the case] applies to issues previously decided either explicitly or by necessary implication.’”) (quoting Guidry v. Sheet Metal Workers Int’l Ass’n, 10 F.3d 705 (10th Cir. 1993)). Here, in denying Amtrak’s earlier motion to file evidence publicly, the Board did not address, either explicitly or by necessary implication, whether to allow a limited number of Amtrak personnel access to a select subset of materials designated as “highly confidential.” Finally, since its January 28, 2022 ruling, the Board has specifically invited the Parties to present additional RTC modeling evidence, and this requires that all of the Parties have a reasonable opportunity to present evidence responsive to the Board’s concerns. Accordingly, the Board will modify paragraph 2 of the protective order served on April 14, 2021, as well as the undertaking for “highly confidential” material, to allow the in-house Amtrak personnel identified in footnote 2 of Amtrak’s motion to access materials produced in connection with the 2020 and 2021 RTC studies that are designated as “highly confidential.” The Board emphasizes, however, that those individuals’ access to “highly confidential” materials is strictly limited to that 2020 and 2021 RTC material and does not extend to any other information or material designated “highly confidential.”

The Board takes seriously the proper handling of materials designated as “highly confidential,” and reminds all Parties that any violation of the protective order may result in the imposition of significant sanctions.

Finally, we note that two further motions have been filed: (1) a renewed motion by CSXT, NSR, and the Port for Board-sponsored mediation and stay, technical conference, and, in the alternative, for an extension of time for filing supplemental evidence, filed on May 19, 2022, to which Amtrak replied on May 20, 2022; and (2) a May 23, 2022 motion by Amtrak to compel CSXT and NSR to produce information requested in Amtrak’s supplemental interrogatories, to which CSXT and NSR replied on May 31, 2022.

By decision served on April 6, 2021, the Board appointed Administrative Law Judge (ALJ) Thomas McCarthy to handle discovery issues in this proceeding. Here, however, Amtrak’s motion to compel arises out of suggestions made by the Board itself during its ongoing evidentiary hearing, and Amtrak may have difficulty responding to those suggestions without at least some of the information sought in its supplemental interrogatories. For these reasons, and because resolution of the motion to compel could affect not only the timing of the Board’s conclusion of the evidentiary hearing but also the scope and quality of any supplemental evidence which may be submitted in response to the Board’s May 12 invitation to the Parties, the Board will reserve to itself a decision on the motion to compel. The Board hopes that the preliminary view expressed above will guide the Parties in resolving Amtrak’s motion to compel on their own, and it continues to encourage the Parties to negotiate resolution of this entire proceeding.

To facilitate settlement, the Board will order Board-sponsored mediation pursuant to 49 C.F.R. § 1109.2(a)(2). The Chairman will soon appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the Parties to discuss the timing and logistics for conducting the mediation, and other matters. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The Board may extend mediation pursuant to mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution. Because Amtrak has not consented to mediate, the Board will not hold the underlying proceeding in abeyance during the pendency of the mediation. See 49 C.F.R. § 1109.3(e).

The Board will address the remaining matters set forth in the pending motions, including the request discussed in note 4, supra, in a subsequent decision. Finally, in light of the pending motions, and, in particular, Amtrak's motion to compel, the Board will extend the deadline for filing supplemental evidence by 30 days, until July 13, 2022.

It is ordered:

1. Amtrak's May 19, 2022 motion to redesignate certain materials as confidential is granted to the extent discussed in this decision.
2. The protective order served on April 14, 2021 is modified, as discussed above.
3. Mediation will be initiated as discussed above.
4. Supplemental evidence is due no later than July 13, 2022.
5. This decision is effective on its service date.

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