

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

ENTERED
Office of Proceedings
December 3, 2021
Part of
Public Record

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

AMTRAK'S MOTION TO ALLOW PUBLIC FILING

Eleanor D. Acheson
Chief Legal Officer, General Counsel
& Corporate Secretary
National Railroad Passenger Corporation
1 Massachusetts Avenue, NW
Washington, DC 20001
(202) 906-3971

Jessica Ring Amunson
Kali N. Bracey
Caroline C. Cease
Jenner & Block LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Counsel for National Railroad
Passenger Corporation*

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496

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

AMTRAK’S MOTION TO ALLOW PUBLIC FILING OF ALL REPLY EVIDENCE

The National Railroad Passenger Corp. (“Amtrak”) respectfully requests that the Surface Transportation Board (“the Board”) enter an order allowing Amtrak to publicly file its Reply Evidence, in response to CSX Transportation, Inc. (“CSX”) and Norfolk Southern Railway Company (“NS”)’s Opening Evidence, without redactions or the separate filing of a confidential version. Due to CSX and NS inaccurately and overbroadly designating historical train operating data as “highly confidential,” Amtrak was required to redact large parts of the Reply Verified Statements of its expert witnesses who relied on and cited such data in their statements and reports. The train movement data that Amtrak’s experts use in their Reply Evidence, and that CSX and NS have designated as “highly confidential,” is not competitively sensitive information and the Board should allow Amtrak’s Reply Evidence to be publicly disclosed in its entirety.

On April 13, 2021, the Board entered a protective order in this proceeding which allows a party to designate “competitively sensitive information” as “highly confidential.” (See April 13, 2021 Decision Granting Protective Order, Appendix at ¶ 2.) Materials designated as “highly confidential” may only be shared with a party’s outside counsel or outside consultants. (*Id.*) If a party files and serves a pleading or evidence containing material designated “highly confidential,” it must file both a redacted and public version of the pleading or evidence. (*Id.* at ¶¶ 10-11.) CSX

has acknowledged that for material to qualify as “highly confidential,” the material must be “deemed so sensitive that it can only be shared with outside counsel and consultants” and “the designating party should have the burden of showing serious competitive harm from disclosure.” (Email from Matthew Warren, Sidley Austin LLP, to Jessica Amunson et al., Jenner & Block LLP (Apr. 5, 2021, 11:38 a.m. EDT) (on file).)

On November 8, 2021, Amtrak requested that CSX and NS reconsider their designation of various materials as “highly confidential.” (See Letter from Amtrak to CSX, Nov. 8, 2021, Ex. A and Letter from Amtrak to NS, Nov. 8, 2021, Ex. B.) Amtrak requested that CSX and NS revise the confidentiality designation of the workpapers filed with CSX’s and NS’s November 3, 2021 Opening Evidence, as well as specific documents produced in discovery identified by Bates number. (See *id.*) As Amtrak noted, the subset of “highly confidential” documents that Amtrak requested reconsideration of primarily contain “maps and past timetables related to CSX’s rail operations” (Ex. A, at 2) and “data related to NS’s rail operations (Ex. B, at 2).

CSX and NS largely refused Amtrak’s request. (See Letter from CSX to Amtrak, Nov. 15, 2021, Ex. C and Letter from NS to Amtrak, Nov. 15, 2021, Ex. D.) While CSX and NS downgraded some “highly confidential” documents to a “confidential” designation, CSX claimed that “[a]ll documents, data, and information that reflect the movement of trains on CSXT’s network are commercially sensitive” including “OS data, train profile data, dispatch data, operating plans, and actual train movement data.” (Ex. C, at 2). Similarly, NS claimed that the disputed “highly confidential” materials contained “highly sensitive information” including “customer-specific traffic” and “traffic and revenue projections.” (Ex. D, at 2.)

CSX’s and NS’s claim that the materials designated as “highly confidential” are commercially sensitive is without merit. NS claims that this type of data is “the most sensitive NS

information, which could lead to significant economic or competitive harm.” (Ex. D, at 2.) CSX similarly claims that this type of data is “commercially sensitive information,” and disclosure “may result in economic or competitive harm to CSXT.” (Ex. C, at 2.) But the public disclosure historical train operating data, train movement data, train counts, and track drawings, would not cause serious competitive harm to CSX or NS. The information contained in the disputed materials is already available the public. Train movements, types of trains, the number of cars on a train, and the railroad tracks themselves are plainly visible to the public. A person or camera stationed along CSX’s or NS’s railroad lines could easily record this type of data simply by observing trains as they move over the rail lines. It is hyperbole to claim this type of data, documenting train types and train movements that are plainly visible to the public, is “the most sensitive” of information and would lead to economic harm. (See Ex. D, at 2.)

Any potential economic or competitive harm that CSX and NS claim from the disclosure of the disputed materials is purely speculative. CSX states that this data could be used “to determine the identity and location of CSXT customers, to obtain customer-specific traffic information such as car volumes, and to analyze CSXT’s business and operations strategy.” (Ex. C, at 2.) NS simply claims that allowing anyone besides outside counsel and consultants to view the disputed materials “could indeed lead to significant economic or competitive harm” with no explanation as to how or why that harm would occur. (Ex. D, at 2.) Amtrak of course does not seek to determine any information about CSX and NS customers. Amtrak simply wanted access to the data so that its own personnel, as well as its experts, could ensure that the inputs that CSX and NS provided for their models reflect operations as they actually exist in the real world. CSX’s and NS’s refusal to share this type of non-commercially sensitive data is the same position CSX and NS took during the 2020 joint RTC study, which rendered that study non-viable.

Amtrak maintains its belief that the disputed materials referenced in its November 8 letters to CSX and NS are not competitively sensitive information and do not meet the threshold of a “highly confidential” designation under the protective order. However, this motion does not ask the Board to make public the documents themselves at this time. Instead, Amtrak simply asks to be allowed to publicly file, without redaction, Amtrak’s own Reply Evidence and accompanying verified statements and reports that rely on, cite, and reference the supposedly “highly confidential” information about CSX’s and NS’s historical train counts and train types. This information is not commercially sensitive and its disclosure would cause no competitive or economic harm to CSX and NS.

CONCLUSION

Amtrak respectfully requests that the Board enter an order allowing Amtrak to publicly file its Reply Evidence without redacting references to the disputed materials, including historical train operating data, train movement data, train counts, and track drawings

December 3, 2021

Respectfully submitted:
/s/ Jessica Ring Amunson

Eleanor D. Acheson
Chief Legal Officer, General Counsel
& Corporate Secretary
National Railroad Passenger Corporation
1 Massachusetts Avenue, NW
Washington, DC 20001
(202) 906-3971

Jessica Ring Amunson
Kali N. Bracey
Caroline C. Cease
Jenner & Block LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Counsel for National Railroad
Passenger Corporation*

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day served copies of this document upon all parties of record in this proceeding, by email on the service list to Finance Docket No. 36496.

December 3, 2021

/s/ Jessica Ring Amunson
Jessica Ring Amunson

EXHIBIT A

November 8, 2021

Kali Bracey
Tel +1 202 639 6867
KBracey@jenner.com**VIA EMAIL**Raymond A. Atkins
Matthew J. Warren
Stephen S. Laudone
SIDLEY AUSTIN LLPratkins@sidley.com
mjwarren@sidley.com
slaudone@sidley.com**Re: Request to Re-designate “HIGHLY CONFIDENTIAL” Documents**

Dear Counsel:

CSX Transportation, Inc. (CSXT) produced approximately 7,165 documents in discovery, designating each and every one of them as either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Many of the “CONFIDENTIAL” documents are publicly available on the Internet or elsewhere and should not have been marked “CONFIDENTIAL.” However, our main concern is with those documents that have been designated “HIGHLY CONFIDENTIAL,” such that we cannot share them with our clients at all. Many of these documents do not contain any competitively sensitive information, as required by the Parties’ April 14, 2021 Protective Order.

First, we request that you revisit the designation of the November 3, 2021 workpapers as “HIGHLY CONFIDENTIAL.” It is perplexing that CSXT and Norfolk Southern Railway Company (NSR), CSXT’s direct competitor, apparently shared and filed the workpapers together and yet these same workpapers cannot be shared with Amtrak, which is not a freight competitor. Second, we request that you revisit the designation of the documents listed below. With respect to both these documents and the November 3, 2021 workpapers (collectively, the “Disputed Documents”), we request that you redesignate these documents either “CONFIDENTIAL” or reproduce them without any confidentiality markings. In the alternative, we request that you provide an explanation for each document, explaining why it has been designated “HIGHLY CONFIDENTIAL.”

Bates Stamp Identification No.	Description
CSX_AmtrakGC_0000001	Actuals data description
CSX_AmtrakGC_0000003	Actuals Gulf Line 2015 to Present

CSX_AmtrakGC_0000004	Milepost maps for Viriato coding
CSX_AmtrakGC_0000005	Milepost maps for Viriato coding
CSX_AmtrakGC_0000006	Milepost maps for Viriato coding
CSX_AmtrakGC_0000007	Profiles data description
CSX_AmtrakGC_0000008	Profiles 2015 to Present
CSX_AmtrakGC_0000009	Summary of actual and profile data
CSX_AmtrakGC_0000010	Train type and class glossary
CSX_AmtrakGC_0004223	OS Data
CSX_AmtrakGC_0004224	OS Data
CSX_AmtrakGC_0008086	OS Data
CSX_AmtrakGC_0008087	OS Data
CSX_AmtrakGC_0008090	OS Data
CSX_AmtrakGC_0008091	OS Data
CSX_AmtrakGC_0008094	OS Data
CSX_AmtrakGC_0008102	M&M Timetable
CSX_AmtrakGC_0008464	Gulf Coast Projected Growth
CSX_AmtrakGC_0008514	Gulf Coast Projected Growth
CSX_AmtrakGC_0022468	HDR 2016 Study
CSX_AmtrakGC_0023278	Gulf Coast Track Charts
CSX_AmtrakGC_0027098	NO&M Timetable
CSX_AmtrakGC_0030593	Amtrak skeletons
CSX_AmtrakGC_0032402	Bridge summary

As you are aware, under Paragraph 2 of the Protective Order, only material that “reflects competitively sensitive information” may be designated and stamped as “HIGHLY CONFIDENTIAL.” As you have previously noted, “highly confidential material” is “material deemed so sensitive that it can only be shared with outside counsel and consultants” and “the designating party should have the burden of showing *serious competitive harm* from disclosure.” Email from Matthew Warren, Sidley Austin LLP, to Jessica Amunson et al., Jenner & Block LLP (Apr. 5, 2021, 11:38 a.m. EDT) (emphasis added) (on file); *see also Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104 (STB served May 5, 2000). The Disputed Documents do not contain information that meets this standard and CSXT bears the burden of identifying what “serious competitive harm” would result from allowing Amtrak to view these documents.

The subset of “HIGHLY CONFIDENTIAL” documents identified above contain primarily maps and past timetables related to CSXT’s rail operations. They do not contain any information that would cause serious competitive harm if disclosed to Amtrak. Indeed, some of these documents, such as the HDR 2016 Study, are already publicly available on the Internet. Similarly, the workpapers filed on November 3, 2021, were jointly filed with CSXT’s direct competitor, NSR, and any claim of serious competitive harm from sharing those documents has therefore been waived.

November 8, 2021

Page 3

To avoid Board intervention, we request that you reconsider the designations for the documents identified herein. If you disagree with this request, please provide an explanation as to why each of the Disputed Documents is considered "HIGHLY CONFIDENTIAL."

Sincerely,

/s/ Kali Bracey

Kali Bracey

EXHIBIT B

November 8, 2021

Kali Bracey
Tel +1 202 639 6867
KBracey@jenner.com

VIA EMAIL

Williams A. Mullins
Crystal M. Zorbaugh
BAKER & MILLER PLLCWMullins@bakerandmiller.com
CZorbaugh@bakerandmiller.com**Re: Request to Re-designate “HIGHLY CONFIDENTIAL” Documents**

Dear Counsel:

Norfolk Southern Railway Company (NSR) has produced approximately 3,967 documents in discovery, designating each and every one of them as either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Many of the “CONFIDENTIAL” documents are publicly available on the Internet or elsewhere and should not have been marked “CONFIDENTIAL.” However, our main concern is with those documents that have been designated “HIGHLY CONFIDENTIAL,” such that we cannot share them with our clients at all. Many of these documents do not contain any competitively sensitive information, as required by the Parties’ April 14, 2021 Protective Order.

First, we request that you revisit the designation of the November 3, 2021 workpapers as “HIGHLY CONFIDENTIAL.” It is perplexing that NSR and CSX Transportation, Inc. (CSXT), NSR’s direct competitor, apparently shared and filed the workpapers together and yet these same workpapers cannot be shared with Amtrak, which is not a freight competitor. Second, we request that you revisit the designation of the documents listed below. With respect to both these documents and the November 3, 2021 workpapers (collectively, the “Disputed Documents”), we request that you redesignate these documents either “CONFIDENTIAL” or reproduce them without any confidentiality markings. In the alternative, we request that you provide an explanation for each document, explaining why it has been designated “HIGHLY CONFIDENTIAL.”

Bates Stamp Identification No.	Description
NSR-00006230	NS Train Data
NSR-00006245	NS Train Data
NSR-00014039	NS Train Data
NSR-00014040	NS Train Data

NSR-00014045	NS Train Data
NSR-00014061	NS Train Data
NSR-00014062	NS Growth Data
NSR-00025566	NS bridge data
NSR-00025567	NS Train Data
NSR-00025568	NS Track chart
NSR-00032322	NS OS Data
NSR-00032321	NS OS Data

As you are aware, under Paragraph 2 of the Protective Order, only material that “reflects competitively sensitive information” may be designated and stamped as “HIGHLY CONFIDENTIAL.” As CXST has previously noted, “highly confidential material” is “material deemed so sensitive that it can only be shared with outside counsel and consultants” and “the designating party should have the burden of showing *serious competitive harm* from disclosure.” Email from Matthew Warren, Sidley Austin LLP, to Jessica Amunson et al., Jenner & Block LLP (Apr. 5, 2021, 11:38 a.m. EDT) (emphasis added) (on file); *see also Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104 (STB served May 5, 2000). The Disputed Documents do not contain information that meets this standard and NSR bears the burden of identifying what “serious competitive harm” would result from allowing Amtrak to view these documents.

The subset of “HIGHLY CONFIDENTIAL” documents identified above contain primarily data related to NSR’s rail operations. They do not contain any information that would cause serious competitive harm if disclosed to Amtrak. Similarly, the workpapers filed on November 3, 2021, were jointly filed with NSR’s direct competitor, CSXT, and any claim of serious competitive harm from sharing those documents has therefore been waived.

To avoid Board intervention, we request that you reconsider the designations for the documents identified herein. If you disagree with this request, please provide an explanation as to why each of the Disputed Documents is considered “HIGHLY CONFIDENTIAL.”

Sincerely,

/s/ Kali Bracey

Kali Bracey

EXHIBIT C



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

+1 202 736 8996
MJWARREN@SIDLEY.COM

November 15, 2021

By Email

Kali N. Bracey
Colleen M. Reddan
Jonathan A. Enfield
1099 New York Avenue, NW, Suite 900
Washington, DC 20001-4412

Re: Finance Docket No. 36496, *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e) – CSX Transportation, Inc. and Norfolk Southern*

Dear Counsel:

We are writing in response to your November 8, 2021 letter regarding the confidentiality designations of (1) the workpapers submitted in connection with the opening evidence filed by CSX Transportation, Inc. (“CSXT”) and Norfolk Southern Railway Company (“NSR”) on November 3, 2021; and (2) documents produced by CSXT during discovery in September 2021. We have reviewed the documents that you asked about, and are reducing the designation of some of them to CONFIDENTIAL. However, many of the documents you identified consist of traffic data, growth forecasts, or other competitively sensitive information that plainly merits a HIGHLY CONFIDENTIAL designation.

The Surface Transportation Board adopted the parties’ jointly proposed protective order, which provides that a party may designate and stamp material produced in discovery as HIGHLY CONFIDENTIAL if that party believes such material “reflects competitively sensitive information.”¹ The Board has long recognized that the “unrestricted disclosure of confidential, proprietary, or commercially sensitive material *could cause serious competitive injury*,” and that a HIGHLY CONFIDENTIAL designation ensures that commercially sensitive material “will be used in connection with this proceeding and not for any other business or commercial purpose.”²

¹ Decision at 3, *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 Apr. 14, 2021).

² *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC 104, at 2 (served May 10, 2000).

November 15, 2021

Page 2

To that end, CSXT has designated certain classes of information HIGHLY CONFIDENTIAL in both discovery and in the opening evidence workpapers. All documents, data, and information that reflect the movement of trains on CSXT's network are commercially sensitive. This would include 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 customers, to obtain customer-specific traffic information such as car volumes, and to analyze CSXT's business and operations strategy. For the same reasons, CSXT also designated as HIGHLY CONFIDENTIAL any documents that contained analysis or projects of future freight growth because this information reveals CSXT's strategy for accommodating expected growth, the status of its customer relationships (existing and prospective), and the overall competitive position of the company.

This type of commercially sensitive material is protected against disclosure by federal law. 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." 49 U.S.C. § 11904(a)–(b). This type of commercially sensitive information is routinely designated as HIGHLY CONFIDENTIAL in STB proceedings.³

If CSXT were to downgrade commercially sensitive data from HIGHLY CONFIDENTIAL to CONFIDENTIAL, that data would be available to the business personnel and in-house attorneys of all parties to this proceeding—including NSR, CSXT's direct competitor. This could reasonably result in economic and competitive harm to CSXT. Moreover, although Amtrak does not compete with CSXT for freight traffic, Amtrak does regularly engage with CSXT's Class I competitors with respect to passenger service and its impact on freight service. Therefore, CSXT is reasonably concerned that the disclosure of commercially sensitive information to Amtrak business personnel and in-house attorneys may result in economic or competitive harm to CSXT. As the Board observed in *Trailer Bridge*, "[i]n-house counsel has obligations to his employer and has interests as an employee which necessarily jeopardize the

³ 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").

SIDLEY

November 15, 2021

Page 3

confidentiality of a competitor's commercially sensitive information entrusted to him.”⁴ Moreover, Congress has specifically mandated that railroads maintain the confidentiality of shipper information, including the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation.

With these well-accepted principles in mind, we will now turn to your specific requests.

Workpapers

You first requested that we “revisit the designation of the November 3, 2021 workpapers as ‘HIGHLY CONFIDENTIAL.’” Amtrak November 8 Letter at 1. This request is predicated on the claim that NSR and CSXT “apparently shared and filed the workpapers together.” *Id.* That is nonsense. CSXT and NSR retained joint outside consultants who received commercially sensitive data separately from CSXT and NSR and who jointly prepared workpapers reflecting that information. At no time were CSXT documents containing OS data, dispatch data, train data, or freight growth analysis data shared with NSR in-house personnel. Nor did NSR share similarly sensitive information with CSXT in-house personnel. All this highly confidential information was exclusively limited to outside counsel and consultants, as contemplated by the protective order and standard STB practice.

CSXT and NSR's outside counsel have conferred about the workpaper designations and have concluded that some redesignations can be made:

With respect to the Engineering Cost Assessment Workpapers that support the report of V3 Companies, we are redesignating everything as CONFIDENTIAL except for the spreadsheet entitled “OOM_20200526_Pricing CSX,” which is located in the “CSX provided info” folder, and the pdf entitled “Gulf Coast RTC Study (FINAL)” located in the top level folder. Those two documents shall remain designated HIGHLY CONFIDENTIAL.

With respect to the RTC Report Workpapers, we are re-designating certain documents as CONFIDENTIAL. First, we are re-designating the “Gulf Coast RTC Workpapers” index as CONFIDENTIAL, a revised version of which is attached to this letter as Appendix A. All documents and folders listed on Appendix A are re-designated CONFIDENTIAL except for those highlighted in yellow. All documents and folders highlighted in yellow, as well as the documents contained in those folders, remain designated HIGHLY CONFIDENTIAL.

⁴ *Trailer Bridge*, No. WCC 104, at 2. And Amtrak has not argued that “it would be an undue financial burden to . . . acquire outside counsel” or an outside consultant to review documents and information designated HIGHLY CONFIDENTIAL. *Id.* at 3 (observing that Trailer Bridge had already “retained competent outside counsel” to participate in the proceeding).

November 15, 2021

Page 4

The documents in both the Engineering Cost Assessment and RTC Report Workpapers that remain HIGHLY CONFIDENTIAL contain commercially sensitive information including OS data, train profile data, dispatch data, operating plans, actual train movement data, or analysis and projections of future freight growth. Moreover, all RTC input files remain designated HIGHLY CONFIDENTIAL because they directly rely on, incorporate, and depict this commercially sensitive information.

Discovery Documents

You also requested that we “revisit the designation” of a specific list of 24 documents produced in discovery that were designated as HIGHLY CONFIDENTIAL. Amtrak November 8 Letter at 1–2. Many of these documents were produced over two months prior to your November 8 letter, and it is not clear why Amtrak delayed so long in making this request. Regardless, we agree that some of the documents set forth in the table below were inadvertently produced as HIGHLY CONFIDENTIAL. In most instances, the HIGHLY CONFIDENTIAL designation was applied because the document in question was part of a larger family that contained documents that were properly designated HIGHLY CONFIDENTIAL.

In the chart below, we have identified which documents may be treated as re-designated CONFIDENTIAL and which documents shall remain designated HIGHLY CONFIDENTIAL.

Bates Stamp	Amtrak Description	Designation
CSX_AmtrakGC_0000001	Actuals data description	Confidential
CSX_AmtrakGC_0000002	Actuals Gulf Line 2015 to Present	Highly Confidential
CSX_AmtrakGC_0000003	Milepost maps for Viriato coding	Confidential
CSX_AmtrakGC_0000004	Milepost maps for Viriato coding	Confidential
CSX_AmtrakGC_0000005	Milepost maps for Viriato coding	Confidential
CSX_AmtrakGC_0000006	Profiles data description	Confidential
CSX_AmtrakGC_0000007	Profiles 2015 to Present	Highly Confidential
CSX_AmtrakGC_0000008	Summary of actual and profile data	Confidential
CSX_AmtrakGC_0000009	Train type and class glossary	Highly Confidential
CSX_AmtrakGC_0004223	OS Data	Highly Confidential
CSX_AmtrakGC_0004224	OS Data	Highly Confidential
CSX_AmtrakGC_0008086	OS Data	Highly Confidential
CSX_AmtrakGC_0008087	OS Data	Highly Confidential

SIDLEY

November 15, 2021

Page 5

Bates Stamp	Amtrak Description	Designation
CSX_AmtrakGC_0008090	OS Data	Highly Confidential
CSX_AmtrakGC_0008091	OS Data	Highly Confidential
CSX_AmtrakGC_0008094	OS Data	Highly Confidential
CSX_AmtrakGC_0008102	M&M Timetable	Confidential
CSX_AmtrakGC_0008464	Gulf Coast Projected Growth	Highly Confidential
CSX_AmtrakGC_0008514	Gulf Coast Projected Growth	Highly Confidential
CSX_AmtrakGC_0022468	HDR 2016 Study	Confidential
CSX_AmtrakGC_0023278	Gulf Coast Track Charts	Confidential
CSX_AmtrakGC_0027098	NO&M Timetable	Confidential
CSX_AmtrakGC_0030593	Amtrak skeletons	Confidential
CSX_AmtrakGC_0032402	Bridge summary	Confidential

CSXT shares Amtrak's desire to avoid Board intervention in disputes over confidentiality designations. To that end, please feel free to reach out if you would like to discuss these issues further.

Sincerely

/s/ Matthew J. Warren

Matthew J. Warren

Attachment

cc: William A. Mullins, Counsel for Norfolk Southern Railway Company

Appendix A

REDACTED – CONTAINS
CONFIDENTIAL INFORMATION

EXHIBIT D

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823

November 15, 2021

Via E-mail

Kali N. Bracey
Jenner & Block LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
Email: kbracey@jenner.com

Re: Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(e)
– CSX Transportation, Inc. and Norfolk Southern Railway Company, FD 36496

Dear Kali:

Norfolk Southern Railway Company (“NSR”) hereby responds to your letter of November 8, 2021. In your letter and on behalf of National Railroad Passenger Corp. (“Amtrak”), you request that certain NSR discovery documents listed in your letter be redesignated from “Highly Confidential” (“HC”) to “Confidential” (collectively, the “Disputed Documents”). Additionally, you ask that NSR consider redesignating CSX Transportation, Inc. (“CSXT”) and NSR’s jointly filed November 3, 2021 workpapers from HC to Confidential.

It appears that Amtrak may be under the impression that the CSXT HC workpapers were shared internally with NSR and vice-a-versa. Such is not the case. Neither the NSR HC discovery documents listed in your letter, nor the NSR HC workpapers were shared with any CSXT in-house personnel. Other than outside legal counsel, the third-party consultants, HNTB Corporation and R.L. Banks & Associates, Inc., which prepared the 2021 Gulf Coast RTC Model, were the only entities that viewed and analyzed the raw data contained in the Disputed Documents and the workpapers.

As I explained in my email Friday, November 12, 2021, we have conferred with NSR and CSXT regarding your request. I have also conferred about the workpaper designations and per those discussions, NSR offers the following additional redesignations:

NSR is willing to redesignate NSR-00025566 to Confidential. As for NSR-00025568, it was inadvertently produced twice. It was first produced as an “HC” document and then produced again as part of a larger production of documents on September 10, 2021, which were

BAKER & MILLER PLLC

Kali N. Bracey
November 15, 2021
Page 2

all designated as “Confidential.” Accordingly, NSR-00025568 may be treated as a “Confidential” document.

NSR is able to redesignate the Engineering Cost Assessment Workpapers that support the report of V3 Companies, as CONFIDENTIAL except for the spreadsheet entitled “OOM_20200526_Pricing CSX,” which is located in the “CSX provided info” folder, and the pdf entitled “Gulf Coast RTC Study (FINAL)” located in the top-level folder. Those two Engineering Cost Assessment Workpapers shall remain designated HIGHLY CONFIDENTIAL.

With respect to the RTC Report Workpapers, NSR is redesignating certain documents as CONFIDENTIAL and keeping other documents HIGHLY CONFIDENTIAL. Those redesignations are attached in Appendix A. All documents and folders listed in Appendix A are re-designated CONFIDENTIAL except for those highlighted in yellow. All documents and folders highlighted in yellow, as well as the documents contained in those folders, remain designated HIGHLY CONFIDENTIAL.

Aside from the specific redesignations noted above, all other Disputed Documents and the workpapers shall remain HC. The Disputed Documents and workpapers remaining HC contain highly sensitive information, such as the non-public terms of transportation agreements involving the railroads and third parties, customer-specific traffic, revenue, price or cost information, or traffic and revenue projections. Designating these documents “Confidential” would allow any CSXT in-house personnel, and any other in-house personnel to this proceeding, the ability to view the most sensitive NSR information, which could indeed lead to significant economic or competitive harm. Absent the existence of the Protective Order, which allows NSR to even produce these documents at all, the production of these documents to Amtrak, CSXT, or other in-house personnel would be a violation of 49 U.S.C. §11904(a)-(b).

The designation of these documents as HC does not prohibit their analysis or use by Amtrak. Amtrak can retain a third-party expert or consultant, just as CSXT and NSR did. This third party can view, analyze, and produce a report or analysis based on those HC documents.

Sincerely,

/s/ William A. Mullins

William A. Mullins
Counsel for Norfolk Southern Railway

cc: Counsel for CSXT – Ray Atkins
NS in-house counsel - Tom Zoeller

Appendix A

REDACTED – CONTAINS
CONFIDENTIAL INFORMATION