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CSXT-10

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY
COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC
RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. –
CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN
RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE
TEXAS MEXICAN RAILWAY COMPANY

CSX TRANSPORTATION, INC. REPLY TO APPLICANTS'
MOTION TO COMPEL DISCOVERY

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Dated: April 11, 2022

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CSX TRANSPORTATION, INC. REPLY TO APPLICANTS’
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CSX Transportation, Inc. (“CSXT”) replies to Applicants’¹ March 30, 2022, Motion to Compel Discovery (“Motion”) responsive to Applicants’ First Discovery Request to CSXT (“Request”).²

I. Introduction

Applicants’ Motion seeks the production of 100% of CSXT’s 2019 year traffic data (the “100% Tape”) without showing the request is relevant to any issue in this proceeding. Applicants try to make much of the process by which CSXT responded to the Request, but the position taken by CSXT regarding the production has not changed since its response on March 5, 2022 – the 100%

¹ Applicants are Canadian Pacific Railway Limited, Canadian Pacific Railway Company, and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, “CP”) and Kansas City Southern, the Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively, “KCS”).

² As Judge McCarthy is aware, CP is in the habit of replying to all pleadings filed in this proceeding, even replies. This pleading is a reply. As are the rules today, even in 2000, “A reply to a reply is not permitted.” 49 CFR 1104.13(c). CSXT respectfully requests that Judge McCarthy reject as not permitted any reply filed by CP or KCS.

Tape bears no discernible relevance to the issues raised in this proceeding and all the information requested from CSXT that Applicants claim is relevant to certain issues is already possessed by Applicants. CSXT should not be required to produce its 100% Tape absent a proper showing of relevance, particularly since this highly sensitive data will become available to CSXT's competitors upon any required production.

II. Background and Argument

Applicants' Request sought "complete traffic tape data for the years 2018, 2019, 2020 and 2021" from CSXT. CP-45/KCS-32, Ex. A at 1.³ Applicants claim in their Motion (CP-45/KCS-32, at 3) that they also made the same request of Norfolk Southern Railway Company ("NS"), BNSF Railway Company ("BNSF"), Union Pacific Railroad Company ("UP") and Canadian National Railway Company ("CN"). The relevance of these requests in the present proceeding is intuitive. NS and CN both filed Responsive Applications on February 28, 2022; and BNSF, UP, and CN are direct competitors of Applicants for movement of traffic to and from Canada, the Western United States, and Mexico.⁴

Applicants suggest Judge McCarthy find the request to CSXT analogous. But CSXT's primary relationship with Applicants KCS and CP is to interchange traffic with KCS at New Orleans, LA; East St. Louis, IL; Gulfport, MS; and Brookwood, AL, and, prospectively, at Meridian, MS; and with CP at Chicago, IL and Detroit, MI.⁵ Only two of those interchanges are at issue, and only one, Meridian, MS, involves questions related to traffic flows. CSXT cannot comprehend how

³ In their Motion, Applicants acknowledge that they have abandoned their request for all years except for 2019. CP-45/KCS-32, at 3.

⁴ The request to CN was far more protective of CN's competitively-sensitive information—CN and Applicants voluntarily exchanged traffic data in November 2020, and so CN's data has not been made generally available to other parties in discovery.

⁵ CSXT only competes for traffic with CP from Chicago and Detroit east and south, and CP has certain trackage rights over CSXT from Chicago east and from New York City north. But Applicants have not suggested these moves would be affected by their proposed transaction.

its traffic flows over its entire network are relevant nor why, as regards Meridian, Applicants do not already know CSXT's traffic flows over that gateway.

Regarding the Meet and Confer sessions on March 28 and 29, Applicants inaccurately describe what occurred, and misstate CSXT's position and rationale for withholding the 100% Tape.

Applicants' Motion states that CSXT "attempted to use access to their traffic tapes as leverage," CP-45/KCS-32, at 5, and before Judge McCarthy they represented that CSXT had held its data "hostage," both implying that CSXT has conceded the relevance of its 100% Tape. On the contrary, CSXT consistently held to its objection to producing the 100% Tape based on relevance in the March 28 session but suggested that it may be open to waiving that objection if it could be assured it would receive discovery, including a deposition, requested from Applicants in a timely fashion. CSXT's concern arose from the Applicants' stonewalling in response to CSXT's First Request and similar response to CSXT's Second Request, requiring CSXT to move to compel before Judge McCarthy. Applicants did not respond satisfactorily to CSXT's Second Request until February 25, 2022, three days before comments and requests for conditions were due under the Surface Transportation Board's (the "Board") Scheduling Order in Decision No. 11. CSXT's offer to waive its relevance objection in exchange for an assurance of a complete, timely discovery response to CSXT's Third Request was an ordinary offer to compromise discovery disputes.

On March 28, 2022, CP suggested that, in lieu of a deposition, CSXT prepare an informal list of questions, which CP-KCS would address in a meeting with CSXT. After that apparently productive first session, on March 29, 2022, CP renewed its suggestion of informal discussions in lieu of formal discovery. CSXT responded with what it considered a viable way to implement that solution – meetings (for which it offered several possible dates) at which Applicants and CSXT would narrow and arrange for the production required of Applicants in exchange for CSXT's waiver of its objections to producing the 100% Tape. CSXT suggested that, in the event these meetings still

resulted in impasse, an expedited ruling from Judge McCarthy could be obtained without further briefing. Applicants abruptly refused to consider the matter further and indicated that they would move to compel, which they did early the next morning.⁶

A. Applicants' Request Does Not Seek Relevant Information

Traffic data are the most commercially sensitive materials that railroads maintain. They show origin, destination, commodity, routing, commercial terms, and shippers' identities among other sensitive material. As the Board has recognized, "[T]he standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party." *See 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. 53, slip op. at 3 (served November 10, 1997) (internal citations omitted). Beyond question, the 100% Tape contains commercially sensitive information and CP and KCS have not met the higher standard of relevance.

CSXT does not agree with Applicants' articulation of the relevance requirement in 49 C.F.R. §1114.21 (information sought must be "relevant to the subject matter of the proceeding"). But CSXT does agree with the Board's articulation of a higher standard for relevance for the 100% Tape.

⁶ Applicants claim that CSXT requested "informal discussions with CP and KCS experts for four half-days before they would *decide* whether they would produce the traffic tapes or no." CP-45/KCS-32 at 5. That is a misunderstanding. Rather, CSXT suggested that the parties discuss the particulars of the CSXT requests and gave Applicants four half days within the next week in which CSXT counsel was able to do so. If the discussions proved fruitful, CSXT would agree to produce its 100% Tape. If not, CSXT offered that Applicants could go back to Your Honor for a ruling on their request for the 100% Tape without a motion to compel, expediting the process considerably. Applicants simply ended the conversation at that point with counsel for CP directing counsel for KCS not to respond to any of the CSXT discovery.

CP and KCS have not even attempted to meet the Board's necessarily higher standard for production of the 100% Tape, which contains the most commercially sensitive materials that railroads maintain. CSXT's single-line movements and movements in interchange with other carriers throughout the Eastern United States for any period (2019 or otherwise) have no bearing on this proceeding – which involves a combination between two railroads that operate elsewhere. The most that Applicants can muster supporting their claim of relevance is that “CSXT's Traffic tape data for 2019 is relevant because it allows Applicants to properly address issues that were raised in Comments and that involve CSXT's traffic flow.” CP-45/KCS-32 at 6. But no Comments involve CSXT's traffic flow except those in interchange with KCS at Meridian, MS.

CSXT's comments involve (in part) *Applicants'* traffic flow, as do the Comments, Requests, and Applications of the other Railroads. If comments, requests, or applications involve claims of other railroads' affected competition with Applicants following the proceeding, it is perhaps appropriate those affected railroads supply their related traffic tapes. But CSXT makes no such claims that competition between it and Applicants will be affected, because CSXT's very limited competition with Applicants is not at issue in this proceeding.

The specific examples of “relevance” offered by Applicants (CP-45/KCS-32 at 7) only further illustrate CSXT's point. Applicants assert that CSXT made its 100% Tape relevant by claiming that the Application “threatens to reduce competition over rail gateways connecting the eastern and western United States.” *Id.* at 7 (quoting to Ex. F. at 1). But that does not involve the CSXT traffic anywhere but at those gateways themselves, as the sentence that follows it confirms: “CSXT makes this assertion in part because it claims the Application will have the effect of ‘reducing the ability of CSXT and KCSR to interchange traffic in New Orleans on commercially reasonable terms, and . . . reducing competition between the eastern and western U.S. by downgrading and reducing traffic volume over the KCSR line between Kansas City and East St. Louis.’” *Id.* at 7 (quoting from Ex. F. at 1-2).

Regarding these interchanges, there is nothing at issue but the traffic interchanged between CSXT and KCS. Yet Applicants never explain (nor could they explain) why they need to obtain CSXT's 100% Tape when they can find everything they need to know about what KCS interchanges with CSXT from their own traffic tapes. Because all the required information is already in Applicants' hands, they have the "ability to generate comparable information from other sources" and therefore fail the Board's balancing test.

Applicants then point to issues other parties have raised as establishing relevance. First, they point to the Springfield, IL line, of which CN requested divestiture. CP-45/KCS-32 at 7-8. Regarding that request, Applicants claim limply that "CSXT's traffic tape data will help Applicants develop a complete picture of the traffic flow, it will also assist Applicants in understanding and responding to the concerns and any proposed conditions of these and other parties." *Id.* But the only railroad moving traffic along the Springfield Line is KCS and KCS interchanges that traffic with CSXT at East St. Louis. Applicants have not even attempted to show how CSXT's 100% Tape showing its movements east of the East St. Louis interchange would have any bearing on the issue raised – whether KCS should keep the East St. Louis gateway open. As the only carrier interchanging Springfield Line traffic with CSXT at East St. Louis, KCS already has CSXT's traffic information relevant to that interchange.

Second, Applicants claim that UP has put CSXT's 100% Tape at issue regarding traffic to and from Mexico that Applicants plan to divert from existing routes involving UP. UP (like CSXT) wants the Laredo Gateway kept open on commercially reasonable terms. Applicants' argument appears to be that CSXT's traffic flows are relevant simply because some UP traffic moving to Chicago interchanges with CSXT at Chicago. *Id.* at 8. But Applicants will have access to that information if UP has committed to exchanging traffic tapes. Moreover, it is unclear how CSXT's traffic tapes for movements east of Chicago (or even at Chicago itself) will "help Applicants respond to these assertions" because the issue raised is the diversion of traffic from existing routes to and from Mexico to routes to, from or through Chicago. CSXT

carries none of that traffic until it reaches an interchange with CSXT for movements to and from the eastern U.S. CSXT's movement of traffic to and from the east will not "affect the outcome of this proceeding," *id.*, and it is ludicrous of Applicants to suggest otherwise.

B. Applicants Are Unable to Rely on 49 C.F.R. § 1180.4(b)(4)(iii)

Besides their insufficient relevance argument, Applicants attempt to justify their request for CSXT's 100% Tape on the procedures of 49 C.F.R. § 1180.4(b)(4)(iii). That justification fails for two reasons.

First, as Applicants concede, Section 1180.4(b)(4)(iii) is not applicable to this proceeding. *See* CP-45/KCS-32 at 6. That is because Applicants requested, and the Board agreed, that the rules in effect before 2001 would control this proceeding and the rules adopted in 2001 would not. Decision No. 4. Applicants' claim that "the Board surely sees it as beneficial for parties to a merger application to share their 100% traffic tapes" is incorrect, as the Board did not consider that requirement important enough to apply it to these proceedings. And Applicants did not consider it important enough because they advocated against applying those rules.

Second, even if 49 C.F.R. § 1180.4(b)(4)(iii) did apply to these proceedings, CSXT never requested Applicants' traffic tapes. Applicants placed them in a depository which all parties could access. Applicants' tapes were therefore available to CSXT without condition. If Applicants wanted reciprocal access to that year's CSXT traffic tapes, it had to request them, as it did in the Request. But to do so, Applicants must show relevance, which they cannot do.

III. Conclusion

The Board should deny Applicants' Motion to Compel the Production of CSXT's 100% Tape in response to the Request.

Respectfully Submitted,

/S/ Paul A. Cunningham

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Dated: April 11, 2022

CERTIFICATE OF SERVICE

I certify that I have caused the foregoing CSX Transportation Inc. Response to Applicants' Motion to Compel Discovery to be served electronically or by first-class mail, postagepre-paid, on the Secretary of Transportation, the Attorney General of the United States, Applicants' representatives, Administrative Law Judge Thomas McCarthy, and all parties of record in this proceeding.

/s/ Paul A. Cunningham

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April 11, 2022