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ALJ

SERVICE DATE – APRIL 13, 2022

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

ORDER GRANTING APPLICANTS' MOTION TO COMPEL

Decided: April 12, 2022

This discovery matter is before the undersigned pursuant to a ruling by the Surface Transportation Board. *See* Decision No. 3 in Docket No. 36500 at 3 (Apr. 21, 2021). On February 23, 2022, Canadian Pacific Railway Limited et al. (“Applicants”) served its First Discovery Request to CSX Transportation, Inc. (“CSXT”). Originally, this Request asked CSXT to

Produce complete traffic tape data for the years 2018, 2019, 2020, and 2021, including all available data records for both loaded and empty movements and revenue and non-revenue movements for the entire CSXT system, and including standard fields of information typically provided to the STB when preparing the Carload Waybill Sample.

Request at 3. The Applicants later narrowed this request to complete traffic tape data (“100% tapes”) for only 2019.

CSXT did not produce the 100% tapes for 2019, and on March 30, 2022, the Applicants filed a Motion to Compel the Production of Documents Requested in Discovery Requests to CSXT (“Motion”). After being ordered to do so by the undersigned, the parties met and conferred, but the issues remained unresolved. On April 11, 2022, CSXT filed its Reply to the Applicants’ Motion to Compel (“Reply”).

The Surface Transportation Board regulations provide for broad discovery. These regulations provide that “[p]arties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). The Board has recognized that this regulation allows for broad discovery. See Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 7), FD 36500, slip op. at 4 (Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery “[b]roadly”); CSX Transp.

& Del. & Hudson Ry.—Joint Use Agreement, FD 35348, slip op. at 3 (STB served Aug. 16, 2010) (parties are entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding and relevance means that information might be able to affect the outcome of a proceeding) (citing 49 C.F.R. § 1114.21).

Despite this broad language, the Board has slightly restricted discovery where it seeks extraordinarily sensitive commercial, competitive, or confidential materials, including 100% tapes. The Board has held that the “[d]isclosure 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.” CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 (STB served Nov. 10, 1997).

The parties both agree that the only issue is the relevance of the 2019 100% tapes. Motion at 4; Reply at 1-2. CSXT alleges that its “single-line movements in interchanges 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.” Reply at 5.

However, CSXT itself raised the issue of the effect this merger might have on shippers. In its Comments and Request for Conditions (“Comments”), CSXT stated that it “objects to the Proposed Transaction to the extent it threatens to reduce competition over rail gateways connecting the eastern and western United States and thereby harm shippers.” Comments at 1. In addition, Applicants’ Motion provides specific examples of competitive concerns on specific lines that trigger a need for a complete picture of traffic flow in those areas. *See* Motion at 7-8.

Information in the 100% tapes, including CSXT’s “origin, destination, commodity, routing, commercial terms, and shippers’ identities,” Reply at 4, is relevant to this alleged threat. This information goes directly to the traffic flow that CSXT alleges will be threatened by a reduction in competition.

Even assuming that the 100% tapes are extraordinarily sensitive information, a balancing of the need for the information against any likelihood of harm favors disclosure. The information is directly relevant to an issue that CSXT raised, and the Protective Order in this matter protects against any unauthorized disclosure.

CSXT argues that “all the information requested from CSXT that Applicants claim is relevant to certain issues is already possessed by Applicants” because one of the Applicants, KCSR, would have access to comparable information. However, the issues of competition raised by CSXT might involve traffic in the areas not involving the Applicants and traffic solely between CSXT and other carriers. As such, this does not change the balance of considerations favoring granting the Motion.

For the above stated reasons, the undersigned **GRANTS** the Applicants' Motion to Compel the Production of Documents Requested in Discovery Requests to CSXT, subject to the Board's Protective Order. Furthermore, given the request for an expedited process and the Board's procedural schedule, CSXT is **ORDERED** to produce the requested information forthwith.

By the Board, Thomas P. McCarthy, Administrative Law Judge.