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**BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. FD 36496**

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

**CSX TRANSPORTATION, INC. AND NORFOLK SOUTHERN RAILWAY
COMPANY'S OPPOSITION TO AMTRAK'S MOTION FOR
REDESIGNATION AND PRODUCTION OF RAIL TRAFFIC CONTROLLER
STUDY MATERIALS**

The National Railroad Passenger Corporation's ("Amtrak's") Motion for Redesignation and Production of Rail Traffic Controller Study Materials ("Motion for Redesignation") seeks to circumvent the Surface Transportation Board's ("Board's") prior rulings and procedural rules. Following the conclusion of Amtrak's case on May 12, 2022, the Board issued an order holding open the evidentiary hearing record to allow each Party an opportunity to submit supplemental evidence to address a list of concerns articulated by the Chairman on the record.¹ Amtrak clearly views the Board's permissive order as an opportunity to relitigate the designation of train movement data as Highly Confidential and to compel the premature disclosure of expert analyses by CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR"). The Board should deny both requests.

¹ See Decision, *Application of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. and Norfolk S. Corp.*, STB Docket No. FD 36496 (served May 17, 2022) ("May 17 Decision").

First, Amtrak seeks to redesignate “all materials produced in connection with the 2020 and 2021 Rail Traffic Controller (“RTC”) studies from Highly Confidential to Confidential.”² The Board explicitly addressed this issue in denying Amtrak’s Motion to Allow Public Filing (“Motion to Allow Public Filing”) filed on December 3, 2021. The Board held that train movement data is of such a commercially sensitive nature that it is properly designated as Highly Confidential under the protective order and determined that Amtrak was not prejudiced because its outside experts had full access to that data.³ And by extension, the Highly Confidential designation is appropriately applied to RTC files as they reflect that very train movement data. The Board’s decision is the law of the case and the only appropriate basis to challenge that decision is via a motion for reconsideration, which Amtrak failed to timely file in accordance with the Board’s procedural rules.

Second, Amtrak requests that the Board “order the immediate production of all additional RTC analyses performed by Mr. [Mark] Dingler, along with any supporting workpapers, *including but not limited to* the additional analyses Mr. Dingler testified about at the hearing on the record.”⁴ This request should be denied as well. To start, Amtrak is impermissibly seeking discovery and disclosure of expert reports and workpapers that are protected by the work product doctrine. And the breadth of this request is not limited to supplemental analysis that Mr. Dingler already conducted, but reaches any other supplemental analysis that may be in progress. Amtrak offers no justification for why it is entitled to preview CSXT and NSR’s litigation strategy in this fashion. Moreover, the Board has permitted but not

² Motion for Redesignation at 6.

³ See Decision, *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. and Norfolk S. Corp.*, STB Docket No. FD 36496 (served January 28, 2022) (“January 28 Decision”).

⁴ Motion for Redesignation at 7 (emphasis added).

required the Parties to file supplemental evidence by June 13, 2022. CSXT and NSR are thus free to submit the supplemental analyses referenced in Mr. Dingler’s direct testimony unchanged, modified, or not at all. Granting Amtrak’s request would rob CSXT and NSR of that right.

I. THE BOARD HAS ALREADY RULED ON AMTRAK’S REQUEST FOR THE REDESIGNATION OF RTC FILES AND WORKPAPERS.

Amtrak seeks a Board order redesignating “all discovery materials and workpapers produced in connection with the 2020 and 2021 RTC studies” from Highly Confidential to Confidential.⁵ This redesignation request is overbroad and foreclosed by the Board’s January 28 Decision.

To start, Amtrak fails to adequately define the scope of its request. CSXT and NSR produced over 10,000 documents in discovery between them, a myriad of which could be classified as “in connection with” the 2020 RTC Study performed by HDR. While the full universe of workpapers associated with the 2021 Gulf Coast RTC Study is easily ascertainable, Amtrak has failed to identify bates numbers for any materials produced in discovery related to the 2020 RTC Study that it wishes to have redesignated. By failing to identify exactly what discovery documents will be redesignated, Amtrak has denied CSXT and NSR the opportunity to carefully evaluate and respond to this request.

More importantly, the Board has already considered and rejected Amtrak’s arguments with respect to the proper classification of train data under the protective order. In its January 28 Decision, the Board not only denied Amtrak’s request to make public any Highly Confidential information in its reply evidence, but the Board also went on to explain that CSXT and NSR’s designations were proper. Specifically, the Board “[found] that the train movement data at issue here

⁵ *Id.* at 6.

is the class of information that the Board has previously allowed parties to designate as highly confidential pursuant to a protective order.”⁶ The reason for this ruling is clear: “the train movement data could be used to determine the identity and location of [CSXT and NSR’s] customers, to obtain customer-specific information such as car volumes, and to analyze their business and operations strategy.”⁷ And this reasoning logically extends to RTC files because those files are developed using the train movement data and are designed to depict simulated train movements when the model is run. Amtrak’s assertion that its in-house personnel have no intention of using train movement data to competitively harm CSXT, NSR, or their respective customers is beside the point. This information is of such a sensitive and commercially competitive nature that any disclosure to another rail carrier (including Amtrak) or other STB litigants poses serious risks as reflected in the statutory protections for this kind of disaggregated traffic data set forth in 49 U.S.C. § 11904.⁸

⁶ January 28 Decision at 4.

⁷ *Id.*

⁸ Amtrak contends that the Board has on occasion approved or modified protective orders to allow certain internal personnel to access Highly Confidential information. Motion for Redesignation at 5. But these exceptions occur in the merger context where the Board has long recognized that cooperation between applicants (who are typically commercial competitors) and other stakeholders is essential because 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. *See, e.g.,* Decision No. 1, *Canadian Pac. Ry. Ltd., et al.—Control—Kansas City S., et al.*, STB Docket No. FD 36500 (served Apr. 2, 2021), at 1–2, App’x ¶ 2; Decision No. 1, *CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consol. Rail Corp. (“Conrail Merger”)*, STB Docket No. FD 33388 (served April 16, 1997), slip op. at 1, App’x A ¶ 2 (collecting examples). And the sole example Amtrak cites pertained to enabling elected officials for an Ohio municipality to fulfill their responsibilities, Decision No. 46, *Conrail Merger*, FD 33388 (served Oct. 17, 1997), at 1, an exception expressly contemplated by 49 U.S.C. § 11904(c)(2). Finally, even

Moreover, Amtrak’s motion seeks redesignation for a purpose that would turn the Board’s long-standing confidentiality regime on its head. Amtrak seeks redesignation “so that Amtrak personnel can view the information and speak freely with Amtrak’s outside consultants about the RTC modeling.”⁹ “Amtrak personnel who are most familiar with the Gulf Coast corridor and with RTC modeling are unable to work on or to direct any of the additional RTC modeling requested by the Board.”¹⁰ That same reasoning could be applied to any number of cases before the Board to justify allowing in-house personnel to see, discuss, and evaluate what is otherwise highly confidential information of other parties relevant to the proceeding. Granting Amtrak’s motion here is simply not necessary as Amtrak, in a proceeding that it initiated, has selected industry experts to make its case. To grant Amtrak’s motion would up-end decades of Board precedent on the matter.

Further, the Board’s January 28 Decision on the designation of train movement data is the “law of the case” and resolves Amtrak’s instant motion. The law of the case doctrine reflects “the practice of courts generally to refuse to reopen what has been decided”¹¹ and has “a rightful and reasonable application to the

if the Board were inclined to extend this narrow agency practice outside of merger cases, Amtrak has offered no explanation for why so many people need to be granted access to the highly confidential data—particularly the raw data that is used to create the RTC inputs—in this case. It is difficult to understand why a single, designated, internal Amtrak RTC modeling expert would need access to the raw, highly confidential traffic data to discuss the RTC modeling assumptions with L.E. Peabody & Associates, Inc. (“Peabody”) given Peabody’s lengthy experience interpreting and using such data. It is impossible to understand why a senior business executive like Jim Blair would need such access.

⁹ Motion for Redesignation at 3.

¹⁰ *Id.*

¹¹ *Rio Grande Indus., Inc., SPTC Holding, Inc., & the Denver & Rio Grande W. R.R. Co.—Control—S. Pac. Transp. Co.*, 4 I.C.C.2d 834, 913 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 44 (1912)).

workings of administrative agencies.”¹² The doctrine applies within the context of a single case “to permit logical progression toward judgment’ with ‘each stage of litigation built on the last’ and ‘no opportunity to reargue every previous ruling.’”¹³ Amtrak’s Motion seeks essentially the same relief as its Motion to Allow Public Filing. In both motions, Amtrak asked the Board to downgrade the Highly Confidential designation of train movement data so that Amtrak could disclose it—last time in a public filing, this time to its in-house personnel via raw data and RTC files.

The Motion for Redesignation also disregards the Board’s rules and practices. A well-settled exception to the law-of-the-case doctrine is a motion for reconsideration.¹⁴ “A party may seek to have the Board reconsider a decision by submitting a *timely petition* that presents new evidence or substantially changed circumstances that would materially affect the case, or that demonstrates material error in the prior decision.”¹⁵ A petition for reconsideration must be filed “within 20 days after the service of the action.”¹⁶

Amtrak has not met any of the Board’s requirements for reconsideration. Not only did Amtrak fail to seek timely reconsideration of the Board’s January 28

¹² *Id.* (quoting *Retail Clerks Union Local 1401 v. NLRB*, 463 F.2d 316, 322 (D.C. Cir. 1972)).

¹³ *Id.* at 914 (quoting 1B Moore’s Federal Practice ¶ 0.404[1], at 118, (3d ed. 1984)). “[T]he ‘law of the case’ doctrine is a ‘practice that rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards.’” *Id.* (quoting Wright, Miller & Cooper, 18B Federal Practice & Procedure: Jurisdiction § 4478 Law of the Case (3d ed. 1981)).

¹⁴ *Id.*

¹⁵ *212 Marin Boulevard, LLC, et al.—Petition for Declaratory Order*, STB Docket No. FD 35825, 2015 WL 1872516, at *3 (served Apr. 24, 2015) (emphasis added); see 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b)(1)–(2).

¹⁶ 49 C.F.R. § 1115.3(e).

Decision, it is recycling the same arguments the Board previously considered and rejected. Amtrak continues to claim that the disclosure of CSXT and NSR's train movement data to Amtrak personnel is justified by its supposed need to confer with its experts and the fact that Amtrak does not compete with CSXT or NSR for customers.¹⁷ Yet the Board explicitly found that Amtrak suffered no prejudice from the Highly Confidential designations in this case because "Amtrak's outside counsel and consultants had access to the highly confidential materials under the protective order in preparing Amtrak's reply evidence."¹⁸ Moreover, Amtrak has proffered no explanation for why Messrs. Thomas Crowley and Daniel Fapp of Peabody, Amtrak's chosen outside experts in a proceeding that Amtrak itself initiated, are incapable of modifying the 2021 Gulf Coast RTC Model to adjust simulation parameters, alter inputs, or test operational changes unless Amtrak in-house personnel receive Highly Confidential train movement data. And Amtrak's reference to the "Clean Team" is equally unavailing because at no point in the process did CSXT internal personnel possess NSR's train movement data or vice versa. Amtrak's Motion to Redesignate is therefore nothing more than an improper attempt to relitigate the Board's determination that train movement data is properly designated Highly Confidential.

In the end, CSXT and NSR believe that the standard confidentiality procedures in this case are more than adequate to provide the transparency behind the RTC modeling inputs desired by Amtrak. First, all of the information has been provided to experienced RTC experts selected and supervised by Amtrak. The

¹⁷ Compare Motion to Allow Public Filing at 3 with Motion for Redesignation at 2, 5.

¹⁸ January 28 Decision at 4; see *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC 104, at 3 (served May 10, 2000) (concluding that the burden of hiring outside counsel is "outweighed by . . . legitimate confidentiality concerns").

Highly Confidential designation on train movement data and RTC files does not prevent Amtrak from discussing all the modeling assumptions with Peabody or directing Peabody to explore any hypothetical modeling scenarios desired by Amtrak executives. Second, CSXT and NSR have proposed a technical conference where all the parties can gather—supervised by experienced RTC modelers within the Board—and discuss all of the technical details of the RTC model’s various cases with experts from Peabody, R.L. Banks & Associates, Inc., and HNTB Corporation. And finally, CSXT and NSR submit that in Board-sponsored mediation, if the mediator concluded that a party needed greater access to a particular RTC input or output to provide a higher degree of transparency to settle this dispute, the parties could either agree to that specific access or approach the Board, if an agency order were needed. But given (1) the highly confidential nature of this freight traffic information that underlies the RTC analysis, (2) the statutory directive to protect that information from unnecessary disclosure, (3) that the agency cannot “unring the bell” once that traffic data is disclosed to a broad group of Amtrak employees, and (4) the longstanding agency practice of using experienced outside consultants like Peabody to safeguard that information without causing any prejudice to a litigant like Amtrak, CSXT and NSR submit there is no grounds to depart from that well-reasoned practice in this case.

II. AMTRAK IS NOT ENTITLED TO SUPPLEMENTAL ANALYSIS OR SUPPORTING WORKPAPERS BY CSXT AND NSR’S EXPERTS PRIOR TO SUBMISSION OF SAME TO THE BOARD.

Amtrak’s demand for the production of expert analysis and supporting workpapers that have yet to be submitted to the Board is not contemplated by the Board’s May 17 Decision, contravenes the Board’s procedural schedule, and violates the work product doctrine. During Mr. Dingler’s direct testimony, counsel for CSXT indicated that Mr. Dingler was prepared to testify as to how two modifications to

the model would impact the projected level of harm to freight transportation after passenger trains were added. The first modification related to certain aspects of how the moveable bridges operated—changes that would ultimately require approval by the U.S. Coast Guard. The second modification concerned the possibility of CSXT running shorter trains between Mobile and New Orleans based on existing siding lengths. Amtrak objected to the introduction of testimony on either of these topics and as Amtrak paraphrased, everyone agreed that “the parties would not solicit on direct examination from their experts any new analysis that had not been disclosed previously.”¹⁹ Therefore, none of this analysis became part of the hearing record and CSXT and NSR have not submitted that analysis in writing as supplemental evidence to date.

The Board held open the evidentiary hearing record until June 13, 2022, “to permit the Parties to submit additional evidence *should they wish to do so*.”²⁰ The May 17 Decision uses permissive language and no party is required to supplement the record in any particular way, or submit supplemental evidence at all. Indeed, the Chairman repeatedly stated on the record throughout the hearing that the Board will not direct any party as to how to try its case and the May 17 Decision is consistent with that approach. Amtrak now urges the Board to do just that by compelling the “immediate production [by CSXT and NSR] of all additional RTC analyses performed by Mr. Dingler, along with any supporting workpapers, *including but not limited to* the additional analyses Mr. Dingler testified about at the hearing on the record.”²¹ Amtrak’s broad request would reach not only the two topics concerning which Mr. Dingler testified, but any other additional RTC

¹⁹ Motion for Redesignation at 4.

²⁰ May 17 Decision at 1 (emphasis added).

²¹ Motion for Redesignation at 7 (emphasis added).

analyses Mr. Dingler may have engaged in since his testimony concluded. Amtrak provides no legal or other justification for why it is entitled to dictate how CSXT and NSR present their case, what evidence they choose to submit into the record, or otherwise preview CSXT and NSR's litigation strategy.

The supplemental analysis and workpapers on these two topics constitute protected work product. This supplemental analysis was conducted after the Board raised these issues at the public hearing and pre-evidentiary hearing conference on February 15 and 16, 2022. CSXT and NSR did not file a final RTC report on these topics and did not ask Mr. Dingler to prepare supporting workpapers for submission to the Board and the other parties because the analysis was conducted after the close of discovery and written evidentiary submissions in Fall 2021. Therefore, any draft analysis and workpapers as well as communications between counsel and Mr. Dingler are protected by the work product doctrine as they reflect trial preparation conducted with and at the direction of counsel.²² And even if the Board disagreed about the applicability of the work product doctrine, Amtrak's request amounts to an improper motion to compel at a time when discovery has been closed for more than seven months.

Moreover, counsel for CSXT and NSR are now entitled to ask Mr. Dingler to modify his analysis on these topics in light of the 11 days of hearing testimony, six of which took place after he testified on direct, and the Board's explanation of

²² See FED. R. CIV. P. 26, 2010 Advisory Committee Notes, Rule 26 (Rule 26(b)(4) "provide[s] work-product protection against discovery regarding draft expert disclosures or reports."); *id.* at Subdivision (b)(4) ("Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.").

perceived “gaps” in the evidentiary record. At the moment, that reexamination and any related adjustments to the RTC modeling are underway, but not yet complete. And even if those analyses and modeling adjustments were complete, with Mr. Dingler out of the country for two weeks, there are no final RTC workpapers on any supplemental modeling that CSXT and NSR can produce until his return.

If CSXT and NSR choose to submit these or any other supplemental analyses into the record on June 13, 2022, Amtrak will receive any final expert report and underlying workpapers at that time. Under CSXT and NSR’s proposal set forth in the renewed motion for Board-sponsored mediation, Amtrak and its experts would then have 30 days to review any new analysis, draft any responsive expert analysis, and prepare for cross-examination when the evidentiary hearing resumes. In responding to that motion, Amtrak did not explicitly oppose a 30-day reply period, but did object to any extension beyond June 13 for CSXT, NSR, or the Port to present additional evidence.²³ Amtrak is not entitled to receive supplemental analysis prior to June 13 that CSXT and NSR may or may not submit merely because it opposes any and every extension or modification of the procedural schedule.

CONCLUSION

For the reasons set forth above, the Board should deny Amtrak’s Motion for Redesignation and Production of RTC Study Materials.

²³ Amtrak’s Response to Renewed Motion From CSX, NS, and the Port for Board-Sponsored Mediation, *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. and Norfolk S. Corp.*, STB Docket No. FD 36496 (filed May 20, 2022), at 4.

Respectfully submitted,

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Dated: May 31, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2022, a copy of the foregoing
Opposition to Amtrak's Motion for Redesignation and Production of Rail Traffic
Controller Study Materials was served by email or first-class mail on the service list
for Finance Docket No. 36496.

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