

BEFORE THE
SURFACE TRANSPORTATION BOARD

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July 31, 2023
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Docket No. NOR 42175

COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f) FOR SUBSTANDARD PERFORMANCE OF
AMTRAK'S SUNSET LIMITED TRAINS 1 AND 2

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO AMTRAK'S MOTION FOR PROTECTIVE ORDER**

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Union Pacific Railroad Company ("Union Pacific") does not oppose entry of a protective order in the captioned proceeding in the form proposed by Amtrak, with two exceptions: the Board should strike (i) the second and third sentences from Paragraph 2 of Amtrak's proposed protective order regarding "Confidential" information, and (ii) the second sentence from Paragraph 3 regarding "Highly Confidential" information.

I. The Board should not undermine the parties' ability to protect their confidential information.

In Paragraph 2, Amtrak wants the Board to tell the parties:

The parties should limit the designation of materials as "CONFIDENTIAL" to the extent possible, bearing in mind the Board's July 9 [sic], 2023 order regarding the importance of transparency and public access to materials concerning this investigation. For example, data underlying publicly available reporting on metrics codified at 49 C.F.R. § 273.5, and documents reflecting information that is observable from public rights of way, do not require "CONFIDENTIAL" designations.

Those two sentences, which would order the parties to limit their designations of material as "Confidential," are inconsistent with the provisions of protective orders entered in other proceedings and could inappropriately prevent railroads from designating their confidential material as "Confidential."

In its Order served July 11, 2023, the Board said the term “Confidential” means “any information, data, documents, or other material . . . that the submitting party in good faith believes reflects proprietary or confidential information.” Order, App. A—Part 1, Def. 1. Amtrak uses that definition in Paragraph 1 of its proposed protective order. *See* Amtrak Mot., App. A, ¶ 1. However, Amtrak proposes to narrow that definition in the second and third sentences of Paragraph 2 of its proposed order.

Amtrak’s proposed limit on the parties’ designation of material as “Confidential” is unprecedented. Even in prior cases involving Amtrak service, the Board’s protective orders have not imposed such restrictions.¹ Rather, the Board’s standard protective orders use the same, or essentially the same, definition as in the Order.

Amtrak says its proposed limiting language “emphasiz[es] the importance of transparency in this proceeding.” Motion at 1. However, the Order addresses “the interest of transparency” here by “mak[ing] the investigative record public, *except as otherwise indicated below*,” Order at 15 (emphasis added)—that is, except to the extent the parties designate material as “Confidential” or “Highly Confidential.” In other words, the Order already emphasizes the importance of transparency, while also recognizing appropriate limits.

The Board should also reject Amtrak’s proposed limiting language because it wrongly suggests the nature of a Board proceeding affects whether particular material is confidential. As the Board’s standard definition recognizes, whether particular material

¹ *See, e.g., Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc.*, FD 36496 (STB served Apr. 14, 2021); *Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat’l Ry.*, FD 35743 (STB served Dec. 16, 2013).

is confidential turns on whether the producing party treats it as confidential. *Cf. Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (holding material is “confidential” within the meaning of FOIA Exemption 4 when it “is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy”).

Finally, the Board should reject Amtrak’s proposed examples of material that should not be considered confidential. Amtrak’s examples are more likely to create disputes than help resolve them. Union Pacific does not know what Amtrak means by its reference to “data underlying publicly available reporting on metrics codified at 49 C.F.R. § 273.5.” If Amtrak means its own data, it does not need that language to treat the data as public. However, if Amtrak is referring to data provided by some other person based on an understanding that Amtrak would keep it confidential, Amtrak should be bound by the terms of that understanding.

In addition, Union Pacific strongly disagrees with Amtrak’s proposed statement that “information that is observable from public rights of way” cannot be “confidential.” Even setting aside the problem of determining precisely what information can or cannot not be observed without trespassing, a compilation of material can be confidential, even if another person could, in theory, develop it through independent observations. As an example, a military base would not be required to publicly disclose the patrol patterns of its perimeter guards, even if another person could, in theory, compile the information by observing the base for several days or weeks. Further, compiled information is often

valuable at least in part because of the effort involved in compiling the information.²

The Board’s standard protective order protects that value by stating that confidential information “shall be used solely for the purposes” of the proceeding in which it was produced.³ The Board would be taking that value if it does not allow the parties to designate such material as “Confidential” and thus makes the material available for public use.

II. The Board should not undermine the parties’ ability to protect their highly confidential information.

In Paragraph 3, Amtrak wants the Board to tell the parties:

The parties should limit the designation of materials as “HIGHLY CONFIDENTIAL” to the extent possible, bearing in mind the Board’s July 11, 2023 order regarding the importance of transparency and public access to materials concerning this investigation.

Union Pacific objects to inclusion of this sentence for the same reasons it objects to inclusion of the second sentence of Paragraph 2—that is, the sentence would narrow the Board’s definition of “Highly Confidential” contained in the Order, *see* Order, App. A—Part 1, Def. 6; it would be unprecedented, *see* cases cited in note 1, *supra*; the Board appropriately balanced the interests of transparency and confidentiality in the Order, *see* Order at 15; and the sentence would wrongly suggest the nature of a Board proceeding affects whether particular material is highly confidential.

² *See, e.g., Continental Group, Inc. v. KW Property Mgmt., LLC*, 622 F. Supp. 2d 1357, 1374 (S.D. Fla. 2009) (concluding “the work and labor expended . . . in compiling the information . . . raises the level of the information to valuable confidential business information in their final compiled form”); *Movie Gallery US, LLC v. Greenshields*, 648 F. Supp. 2d 1252, 1264 (M.D. Ala. 2009) (holding “detailed and valuable compilations of information from hundreds of small rural stores over thousands of miles” were “confidential”).

³ *See, e.g., Mot., App. A, ¶ 2.a.*

III. Conclusion

The Board should not depart from its standard protective order here. The Board should strike the second and third sentences of Paragraph 2 of Amtrak's proposed order and the third sentence of Paragraph 3 of Amtrak's proposed order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal