

SURFACE TRANSPORTATION BOARD

DECISION

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

Decided: August 18, 2023

By decision issued on July 11, 2023 (July 2023 Decision), the Board initiated an investigation under section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, 122 Stat. 4848, codified at 49 U.S.C. § 24308(f)(1), to examine the cause(s) of substandard on-time performance on Amtrak’s *Sunset Limited* service.

Amtrak filed a motion for a protective order on July 18, 2023, including a proposed draft protective order.¹ Amtrak states that the draft protective order includes language that “emphasiz[es] the importance of transparency in this proceeding.” (Amtrak Mot. for Protective Ord. 1.) On July 31, 2023, Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) each filed a reply to Amtrak’s motion for protective order, objecting to certain language Amtrak included in the draft protective order.

UP objects to the following language that Amtrak included in Section 2 of the draft protective order:

The parties should limit the designation of materials as “CONFIDENTIAL” to the extent possible, bearing in mind the Board’s July 9, 2023 [sic] 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.

¹ Concurrent with its Complaint and Petition for Board Investigation and Other Relief, Amtrak filed a separate motion proposing a procedural framework for the proceeding on December 8, 2022. As part of that motion, Amtrak requested, among other things, that the Board issue a protective order to facilitate prompt production of evidence. (Amtrak Mot. 8.) In the July 2023 Decision, the Board directed Amtrak to submit a draft protective order, in accordance with the agency’s past general practice. July 2023 Decision, NOR 42175, slip op. at 15-16.

(Amtrak Mot. for Protective Ord., App. A.) UP also objects to corresponding language regarding Highly Confidential information in Section 3 of the draft protective order, which states:

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.

(Id.) UP argues that this language is not necessary because the July 2023 Decision already sufficiently emphasizes the importance of transparency while still recognizing appropriate limits. (UP Reply to Mot. for Protective Order 3.) UP also asserts that this proposed language wrongly suggests the nature of a Board proceeding affects whether particular material is confidential. (Id. at 3-4.) Lastly, UP takes issue with the proposed example included by Amtrak in Section 2 of the draft protective order, stating that such language is likely to create disputes and that it disagrees with part of the statement. (Id. at 4.)

In its reply, BNSF takes issue only with the example provided by Amtrak in Section 2. BNSF states that it conferred with Amtrak about striking this sentence and that Amtrak agreed, so long as doing so “does not prejudice Amtrak’s right to challenge the designation of any items that fall into the enumerated categories, and so long as Amtrak is permitted to bring such challenges to the Board if the parties cannot resolve them amicably.” (BNSF Reply to Mot. for Protective Ord. 2.) BNSF requests that the Board therefore strike that sentence but otherwise grant Amtrak’s motion for a protective order. (Id. at 2-3.)

As the Board previously indicated in the July 2023 Decision, good cause exists to grant the motion for protective order. Doing so will ensure that confidential information will be used solely for this proceeding and not for other purposes. Further, the motion conforms with the Board’s rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted.

The parties dispute whether the protective order should include Amtrak’s proposed language that directs parties to the investigation to limit the amount of material they designate as Confidential or Highly Confidential to the extent possible, given the Board’s stated interest in transparency. The Board will exclude this language from the protective order being adopted for this proceeding. This language, which is not typically included in protective orders, could lead to disputes among the parties and would be difficult for the Board to enforce if it were called upon to do so. Removing this language also will not impact any party’s ability to access Confidential or Highly Confidential information. Under the terms of the protective order being adopted, parties may challenge a producing party’s designation and bring the matter to the attention of the Board. See infra App. A, Sections 2 and 3; see also 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. 11, 2015).

The Board will also make two additional changes to Amtrak's draft protective order. In Section 4, the Board will delete the first sentence, which states: "The Board emphasizes that the reasoning for a 'HIGHLY CONFIDENTIAL' designation is to protect information that is 'competitively sensitive.'" Such commentary language is normally not included in a protective order and removing it does not change the substance of the provision. The Board will also insert language requiring that any party to the investigative proceeding that files a Confidential or Highly Confidential pleading to the Board must include a public version. Although this instruction is stated in the Board's July 2023 Decision, it is a particularly important part of the standard protective orders issued by the Board and will ensure that any individual reviewing the protective order is aware of this requirement.

It is ordered:

1. The motion for a protective order is granted. The Protective Order and Undertakings in the Appendix to this decision are adopted.
2. Materials designated as confidential or highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.
3. The decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

APPENDIX A

PROTECTIVE ORDER

1. As set forth in Appendix A, Part I, of the July 11, 2023 order of the Surface Transportation Board (the “Board”), “CONFIDENTIAL” means any information, data, documents, or other material produced in discovery to another party to this proceeding, or submitted material in pleadings, that the submitting party in good faith believes reflects proprietary or confidential information. “HIGHLY CONFIDENTIAL” means any information, data, documents, or other material produced in discovery to another party to this proceeding, or submitted material in pleadings, that the submitting party in good faith believes reflects competitively sensitive information.
2. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) to the Board or in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. If any party wishes to challenge a “CONFIDENTIAL” designation, that party may bring such matter to the attention of the Board to adjudicate such challenge. Material, any copies, and any data or notes derived from information, data, documents, or other material designated “CONFIDENTIAL”:
 - a. Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
 - b. May be disclosed only to employees, counsel, or agents of parties to the proceeding who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
 - c. Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order.
 - d. If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” *See* 49 C.F.R. § 1104.14.
3. Any party producing material to the Board or in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects competitively sensitive information, may designate and stamp such material as “HIGHLY

CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board to adjudicate such challenge. Material that is designated as “HIGHLY CONFIDENTIAL” may be disclosed only to outside counsel or outside consultants of Parties to the proceeding, or to employees or agents of such outside counsel or outside consultant of the party, who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order.

4. Information may qualify as competitively sensitive when shared with a party with whom the producing party directly competes, but that same information may not qualify as competitively sensitive when shared with another party with whom the producing party does not directly compete. Where a party receiving information designated as “HIGHLY CONFIDENTIAL” information does not compete directly with the producing party, permitting in-house personnel at the receiving party to access and review “HIGHLY CONFIDENTIAL” material may enhance this investigation and aid the Board in making investigative findings. With these principles in mind, where a receiving party determines that it is necessary and appropriate for in-house personnel to review “HIGHLY CONFIDENTIAL” information, the Board directs the parties to meet and confer about whether the receiving party shall be permitted to have specific in-house personnel execute the “HIGHLY CONFIDENTIAL” undertaking and access “HIGHLY CONFIDENTIAL” information. Should the parties fail to reach agreement during their meet and confer, the receiving party may move the Board for modification of this Protective Order, and shall in any motion specify the name and title of each in-house personnel along with the reason why it is necessary and appropriate for the requested individuals to be granted access to material designated “HIGHLY CONFIDENTIAL.” The producing party shall have ten business days to respond to any such motion, or such other period as the Board may direct.
5. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material. The parties have a continuing obligation to notify the producing party of any material that the receiving party in good faith believes was inadvertently produced without a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation.
6. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make

a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party returns the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege. The parties have a continuing obligation to notify the producing party of any material that the receiving party in good faith believes may be privileged and was inadvertently produced.

7. Notwithstanding the provisions of this Protective Order, material may be disclosed to court reporters or notaries public with official responsibilities related to this proceeding. Such reporters and notaries shall not be required to execute the confidentiality undertakings provided for in this Protective Order, but persons disclosing such material must receive assurances that such reporters and notaries will comply with the restrictions on disclosure of material set forth in this Protective Order.
8. If any party intends to use or disclose “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit a written request that the Board or the court to: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
9. If any party intends to use “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as such material in accordance with the terms of this Protective Order.
10. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 business days of the determination that such material is to be released, or within 3 business days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
11. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the

same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.

12. Each party has a right to view its own data, information and documentation (*i.e.*, information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party.
13. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” pleading in this proceeding should simultaneously file a public version of the pleading.
14. Instructions concerning submission of information are set out in Appendix A, Part I of the Board’s July 11, 2023 order, and shall govern the submission of any pleading, document, answer, or other similar document in this proceeding.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on August 18, 2023, governing the production of confidential documents in STB Docket No. NOR 42175, understand the same and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. NOR 42175 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking, and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING**HIGHLY CONFIDENTIAL MATERIAL**

As _____ for _____, for which I am acting in this proceeding, I have read the Protective Order served on August 18, 2023, governing the production of confidential documents in STB Docket No. NOR 42175, understand the same and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed a “HIGHLY CONFIDENTIAL” undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by persons not permitted to see HIGHLY CONFIDENTIAL information under this Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such HIGHLY CONFIDENTIAL information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking, and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____