

BEFORE THE
SURFACE TRANSPORTATION BOARD

235515

Docket No. FD 35743

ENTERED
Office of Proceedings
February 21, 2014
Part of
Public Record

APPLICATION OF THE NATIONAL RAILROAD PASSENGER
CORPORATION UNDER 49 U.S.C. § 24308(a) - CANADIAN
NATIONAL RAILWAY COMPANY

PETITION OF CSX TRANSPORTATION, INC. TO INTERVENE IN
PARTIAL OPPOSITION TO MOTION TO COMPEL OF ILLINOIS
CENTRAL RAILROAD COMPANY AND GRAND TRUNK WESTERN
RAILROAD COMPANY

Peter J. Shudtz
Cindy Craig-Johnson
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel to CSX Transportation, Inc.

February 21, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35743

**APPLICATION OF THE NATIONAL RAILROAD PASSENGER
CORPORATION UNDER 49 U.S.C. § 24308(a) - CANADIAN NATIONAL
RAILWAY COMPANY**

**PETITION OF CSX TRANSPORTATION, INC. TO INTERVENE IN
PARTIAL OPPOSITION TO MOTION TO COMPEL OF ILLINOIS
CENTRAL RAILROAD COMPANY AND GRAND TRUNK WESTERN
RAILROAD COMPANY**

On February 12, 2014, Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, "CN") filed a motion to Compel Responses to Requests for Production of Documents ("Motion to Compel") in the above captioned matter. Pursuant to 49 C.F.R. § 1112.4, CSX Transportation, Inc. ("CSXT") submits this Petition for leave to intervene in partial opposition to the Motion to Compel.

CN's Motion to Compel implicates confidential private operating agreements CSXT has entered with the National Railroad Passenger Corporation ("Amtrak"), created or in effect on or after May 1, 2011. Pursuant to 49 C.F.R. § 1114.21(c), "any person with a reasonable interest in the data, information, or material sought to be discovered" in a proceeding may request that the Board protect such information, including "[t]hat a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way." But CSXT's documents should be

designated as Highly Confidential under the Board's protective order for two reasons.

First, the operating agreements meet the Board's requirements for protective conditions, as well as the protective order's definition of Highly Confidential. Disclosure, therefore, should be limited to outside counsel and consultants. The information contained in the operating agreements is exactly the type of information the Board's rules and the protective order entered in this case are designed to protect from broad disclosure. The protective order allows "confidential financial or cost information," and other "competitively sensitive" terms to be designated Highly Confidential. Protective Order at 2 (¶3). CSXT's operating agreements with Amtrak include many such provisions. For example, the operating agreements contain specific cost information for different items such as track maintenance; station utilities; and transportation of cars and locomotives. *Id.* The specific operational issues included in the operating agreements, such as train speeds; standards of performance; performance payments and penalties; and control and supervision, also constitute "commercial information" for purposes of Section 1114.21(c)(8) of the Board's rules and "competitively sensitive" information under the protective order.¹

¹ CN observes that one of CSXT's operating agreements with Amtrak was made publically available on the internet and maintains that this undermines any general claim of confidentiality. *See* Motion to Compel at 19. But this fact does not justify refusing to protect all of CSXT's operating agreements with Amtrak. Confidential documents are made public for a variety of reasons. Indeed, the Board itself has explained that "[a]lthough the Board attempts to avoid references to confidential or highly confidential information in our decisions, we reserve the right to rely on and disclose such information when necessary." *Cargill, Inc. v. BNSF Ry. Corp.*, STB Docket No. 42120, slip op. at 7, n.12 (STB served Aug. 12, 2013). To the extent CN seeks to determine what agreement is in effect on or after May 1, 2011, the Board should protect the confidentiality of that information with the Highly Confidential designation.

The Board regularly protects these kinds of confidential agreements by use of the Highly Confidential designation. *See, e.g., Carolina Power & Light Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42072, slip op. at 6 (STB served Aug. 26, 2002) (“Any concerns of the shippers regarding disclosure of sensitive materials should be directed to the complainant, who, along with the defendant, can determine what level of confidentiality should be assigned to the material produced.”); *Texas Mun. Power Agency v. Burlington Northern & Santa Fe Ry. Co.*, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001) (“While we understand the concerns raised by those shippers here, we are satisfied that the parties’ agreements regarding scope and the application of the ‘highly confidential’ provisions of the protective order are sufficient to protect the interests of third-party shippers.”).

Second, CN has offered no persuasive reason for not designating CSXT’s operating agreements Highly Confidential. CN’s only argument is that this designation “represents a severe restriction on the ability of the parties to consult with their outside counsel, and it could potentially constrain parties’ counsel to file redacted submission and briefs that their client could not see in unredacted form.” Motion to Compel at 17, n.21. Yet Highly Confidential materials are used extensively in a variety of proceedings, from rate cases to abandonments. CSXT itself has been a party in several recent proceedings involving such information and knows that the designation is not a barrier to outside counsel producing effective advocacy. Moreover, CN maintains that the terms and conditions found in these operating agreements are relevant to the question of what is a “reasonable” operating agreement. But these are largely legal terms for which outside legal counsel should be fully capable of analyzing. And the prospect of filing a public and confidential version is a burden the Board has long accepted as proper when dealing with confidential information of this sort. In short,

designating these agreements Highly Confidential should not impair CN's ability to develop and present its case.²

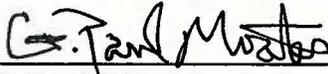
CSXT also asks the Board – should these operating agreement be produced – to require CN and Amtrak to provide CSXT (and the other railroads whose operating agreements are produced) with signed copies of the confidential undertakings by outside counsel and consultants. CSXT believes this modest request is justified because it provides CSXT with knowledge of who has access to its confidential operating agreements and the competitively sensitive information contained therein. It allows CSXT and other railroads to better monitor and protect themselves from any inadvertent and improper disclosure or use of these operating agreements in other proceedings or circumstances.

² Furthermore, if after reviewing Highly Confidential versions of the operating agreements outside counsel still maintains the documents should be treated differently, they can file a motion to redesignate. *See, e.g., Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, slip op. (STB served July 15, 2011). However, CSXT would retain the right to disagree and urge the Board to maintain the Highly Confidential designation.

CONCLUSION

For the reasons discussed, the Board should grant CSXT's Motion to Intervene. If the Board finds the operating agreements relevant to this proceeding, it should require the production of those agreements as Highly Confidential. CSXT also asks that the Board instruct the parties to provide CSXT with signed copies of the undertakings in this proceeding by any outside counsel or consultant who is granted access to CSXT's operating agreements with Amtrak.

Respectfully submitted,



Peter J. Shudtz
Cindy Craig-Johnson
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Marc A. Korman
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc.

Dated: February 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 21th day of February, 2014, I caused a copy of CSXT's Petition to Intervene in Partial Opposition to be served by email upon the parties of record in this proceeding:

David A. Hirsh
Harkins Cunningham
1700 K Street, NW
Suite 400
Washington, DC 20006

James A. Hixon
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA 23510

Linda Morgan
Nossaman, LLP
1666 K Street, NW
Suite 500
Washington, DC 20006



Marc A. Korman