

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 770 (Sub-No. 1)

URGENT ISSUES IN FREIGHT RAIL SERVICE—RAILROAD REPORTING

Digest:¹ The Board denies the motion for protective order filed by Union Pacific Railroad Company (UP) and directs UP to file public versions of certain filings.

Decided: March 13, 2024

By decision served January 31, 2024 (January 31, 2024 Order), the Board extended the period for temporary reporting of employment data for all Class I carriers to December 31, 2024, and required certain updated information from BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), and Union Pacific Railroad Company (UP) (collectively, the Four Carriers). On February 14, 2024, UP filed a motion for protective order. For the reasons discussed below, the Board will deny UP’s motion and direct UP to file public versions of certain submissions, consistent with this decision.

BACKGROUND

The Board held a public hearing in April 2022 to discuss serious rail service problems and recovery efforts. See Urgent Issues in Freight Rail Serv., EP 770, slip op. at 1, 3 (STB served Apr. 7, 2022). There, the Board heard testimony about several carriers’ poor service metrics, the connection between poor service and crew shortages, and the impact of poor service on rail users whose businesses are central to the country’s economic well-being. Following the hearing, the Board issued a decision in this docket on May 6, 2022 (May 6, 2022 Order), directing the Four Carriers to submit recovery plans and progress reports, participate in biweekly conference calls to further explain efforts to correct service deficiencies, and report (along with all Class I carriers) more comprehensive and customer-centric performance metrics and employment data for a six-month period. May 6, 2022 Order, EP 770 (Sub-No. 1), slip op. at 4-5. With respect to the employment data, the Board required monthly reporting, on a system-wide and operating-division level, that included information on total employee count, additions, separations, furloughs, the availability of “extra-board employees,” and, for certain categories of employees, the number employees working in active service. Id. at 7.

Because the Four Carriers’ service recovery plans did not meet the Board’s expectations

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

(and, in some instances, did not comply with the May 6, 2022 Order), the Board issued a decision on June 13, 2022 (decision ID 51271) (June 13, 2022 Order), directing the Four Carriers to submit revised plans detailing how they intended to improve service on their respective freight rail networks. June 13, 2022 Order, EP 770 (Sub-No. 1), slip op. at 5. As relevant here, the Four Carriers were directed to include labor force targets for employees actually on the job (i.e., those employees who are not furloughed), broken out by the categories of train and engine, maintenance of way and structures, maintenance of equipment and stores, customer service employees, and all remaining personnel. Id. at 7. Additionally, the Board directed the Four Carriers to provide detailed information about their plans, if any, to incentivize hiring and retention, including a discussion of the policies and incentives they intended to use to maintain an adequate labor supply. Id. The Four Carriers were also required to include certain data about trainees in their monthly employment data and service recovery plans. Id. at 7-8.

By decision served October 28, 2022 (October 28, 2022 Order), the Board extended the reporting requirements for an additional six months. Oct. 28, 2022 Order, EP 770 (Sub-No. 1), slip op. at 18. The data submitted by the Four Carriers at the time suggested that they would not meet all of their six-month performance targets and that widespread service issues continued to affect the network. Id. at 17. The Board also required that each of the Four Carriers submit an interim update and that BNSF and UP provide updated labor force targets.² Id. at 19. The temporary reporting period was again extended, through December 31, 2023, by decision served May 2, 2023 (May 2, 2023 Order).³ May 2, 2023 Order, EP 770 (Sub-No. 1), slip op. at 7. The Board explained that, while not all Class I carriers were experiencing service problems to the same degree and the data showed some improvement for some performance indicators, problems with one carrier or in one area can quickly spread due to the interconnectivity of the rail network. Id.

Concerned whether carriers would have sufficient workforce to handle an increase in demand, by decision served January 31, 2024 (January 31, 2024 Order), the Board directed all Class I railroads to continue to submit the monthly employment data required in the May 6, 2022 Order through December 31, 2024. Jan. 31, 2024 Order, EP 770 (Sub-No. 1), slip op. at 7-8. The Board also directed each of the Four Carriers to provide (1) a second interim update with updated labor force targets and (2) detailed information about any updated plans to incentivize hiring and retention, including identifying any specific policies and incentives they intend to use to maintain an adequate labor supply along with an explanation of how such measures will attract and retain personnel. Id. at 8-9. The Board did not extend the service data reporting since overall performance data, especially with regard to service, showed improvement and the Four

² CSXT and NSR were permitted to update their labor force targets if necessary. Oct. 28, 2022 Order, EP 770 (Sub-No. 1), slip op. at 19. The Board stated that it would not require the Four Carriers to continue to participate in individual biweekly conference calls. Id. at 18.

³ Pursuant to the May 2, 2023 Order, CSXT was no longer required to submit biweekly service progress reports or include trainee information in its monthly employment data because CSXT had been meeting most of its targets for service improvement on a consistent basis. May 2, 2023 Order, EP 770 (Sub-No. 1), slip op. at 7.

Carriers were meeting the majority of their one-year service targets. Id. at 1-2, 7, 9.

On February 14, 2024, UP filed a motion for protective order under 49 C.F.R. § 1104.14(b), stating that a protective order is required to permit UP to submit certain information in response to the Board's January 31, 2024 Order. (UP Mot. 1.) UP's proposed protective order contemplates three categories of confidential information: confidential, highly confidential, and confidential commercial information. (Id., App. A at 1-2.) The proposed protective order treats confidential information and highly confidential information in the same manner as protective orders typically approved by the Board;⁴ however, information designated as confidential commercial information could not be disclosed to anyone, including outside counsel or consultants of a party of record. (Id.)

The following day, on February 15, 2024, UP submitted its monthly employment data through January 31, 2024. UP designates its January 2024 employment data as "Confidential" under the proposed protective order and asserts in a cover letter that the data "reflects proprietary or confidential information."⁵ (UP Status Report, Letter 2, Feb. 15, 2024.) According to UP, a competitor could use the employment data to discern trends about "where [UP] is devoting resources 'to retain business, support new business, and improve service.'" (Id., Letter 2, 4; id., V.S. Prauner ¶ 4.) UP states that, although it makes system-wide employee data publicly available, it protects from disclosure employee data on an operating division level in the ordinary course of business to remain competitive with other railroads and trucking companies. (Id., Letter 2.) For the same reasons, UP states that the data is exempt from public disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). (Id., Letter 3-5.) UP states that it did not object to the public release of its monthly employment data from 2022 to 2023 because of "unique and transitory market considerations that are no longer in effect." (Id., Letter 4.)

On February 29, 2024, UP submitted its second interim update. Citing the reasoning in its February 15 submission, UP explains in a cover letter that it designates the labor force targets and certain aspects of the updated hiring and retention plan as either "Confidential" or "Confidential Commercial Information" under the terms of its proposed protective order. (UP Second Interim Update, Letter 1.) According to UP, the redacted information either "reflects proprietary or confidential information" or "could reasonably be expected to cause substantial competitive harm" if disclosed. (Id., Letter 1-2.) UP reiterates its position that competitors

⁴ Specifically, the proposed protective order allows disclosure of confidential information only to employees, counsel, or agents of a party of record who have a need to know, handle, or review the material for purposes of the proceeding and any resulting judicial review, and only where such persons have read and agreed to be bound by the terms of the protective order. (UP Mot., App. A at 1.) The proposed protective order contains the same disclosure limitations for highly confidential material except that it further limits disclosure to outside counsel or consultants of a party of record who have a need to know, handle, or review the materials for purposes of the proceeding at issue. (Id.)

⁵ UP states that it reserves the right to redesignate the data as highly confidential if a competitor requests access. (UP Status Report, Letter 2, Feb. 15, 2024.)

could use the data to ascertain UP's non-public business plans based on its current and planned allocation of resources, which UP asserts could undercut its ability to compete for the best candidates to fill open positions. (Id., Letter 2; id., Letter, V.S. Janke 1; id., Letter, V.S. Eggspuehler 1.)

BNSF also submitted its second interim update on February 29, 2024. In the cover letter accompanying its submission, BNSF states that it does not take any position on the merits of UP's motion but requests that, however the Board resolves the issue, the Board extend consistent treatment to any similar information submitted by BNSF. (BNSF Second Interim Update, Letter 1.) BNSF states that it would promptly make any necessary changes to impacted submissions. (Id.)

The Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Boilermakers; International Association of Machinists and Aerospace Workers District #19; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (collectively, the Unions) filed a reply to UP's motion, as well as comments in response to UP's February 15 and February 29 submissions. In their reply, filed February 23, 2024, the Unions urge the Board to deny UP's motion because it is unsupported and fails to explain why UP's concerns about disclosure were not present when the Board required UP to publicly report the same information previously. (Unions Reply 1-2.) The Unions also argue that the same type of information requested by the Board in this proceeding is routinely disclosed in, or can be derived from, carriers' R-1 reports and other monthly reports that have been publicly accessible for decades. (Id. at 2.) The Unions assert that UP would not be in the position of having to report this data if its poor service, and that of the other large Class I carriers, had not necessitated this proceeding. (Id. at 4.) According to the Unions, recent actions by UP leadership, including additional furloughs, reveal that UP is not staffing to meet current needs or to increase capacity, but rather to artificially lower its operating ratio—a strategy the Unions claim justifies Board scrutiny of UP's employment, hiring and retention data and plans, as well as public access to that information. (Id. at 4-5.)

In their comments in response to UP's February 15 and February 29 submissions, filed February 26, 2024, and March 5, 2024, respectively, the Unions argue that the Board should not consider the argument UP appended to those submissions. The Unions argue that it is improper for UP to provide support for its motion in its subsequent submissions. (Unions Comment 1-2, Feb. 26, 2024; Unions Comment 2, Mar. 5, 2024.)

On March 1, 2024, Freight Rail Customer Alliance (FRCA) and National Coal Transportation Association (NCTA) jointly replied to UP's motion. In addition to stating their support for the Unions' reply and comments, FRCA and NCTA argue that the data is highly aggregated and therefore unlikely to bear on any specific opportunities. (FRCA/NCTA Reply 1, Mar. 1, 2024.) They assert that UP has not identified any harm from its prior disclosures and argue that it is "empty conjecture" for UP to claim that it might now experience harm for the disclosure of the same type of data that UP previously filed without restriction. (Id.) According to FRCA and NCTA, whether the "unique and transitory market considerations" to which UP

refers remain in effect or will return is the very reason the Board ordered the reporting, and they argue that the reporting is even more necessary now in light of UP's recent actions and statements about its future plans. (*Id.*) FRCA and NCTA argue that, by seeking confidential treatment of information that other carriers are providing publicly, UP seeks to create an unlevel playing field. (*Id.* at 2.) FRCA and NCTA further argue that UP's invocation of Exemption 4 of FOIA is misplaced because, even if the information did fall within the exemption, protection under FOIA is discretionary. (*Id.*) In sum, FRCA and NCTA assert:

[h]aving inflicted enormous harm on FRCA's and NCTA's members, other customers, and the general public due to its failure or refusal to serve, UP should not be allowed to impose restrictions on access to and use of information pertaining directly to whether those customers and the public can expect UP to provide reasonable and adequate service going forward.

(*Id.*)

In a letter addressed to UP's Chief Executive Officer, Jim Vena, and filed with the Board on February 29, 2024, the Federal Railroad Administration (FRA) expresses "significant concerns" regarding UP's decision to furlough maintenance of equipment workers. (FRA Letter 1, Feb. 29, 2024; *see also id.* at 2 (providing illustrative graphs of data from this proceeding to show the trends in UP's furloughs).) FRA then discusses UP's "unprecedented decision" to seek a protective order for its employment data submissions and states that, should the Board grant UP's motion, UP will become the only Class I railroad for which FRA cannot track furlough counts, which, according to FRA, raises questions about UP's priorities. (*Id.* at 3.) FRA explains that the data submitted in this docket "provide FRA and the U.S. Department of Transportation with invaluable insight into factors that affect the safety, reliability, and efficiency of railroad operations." (*Id.*) According to FRA, limiting access to the data as UP proposes would undermine the transparency promoted by the Board's decision to extend the collection of that employment data through 2024. (*Id.*)

On March 12, 2024, the Private Railcar Food & Beverage Association (PRFBA) filed a letter in opposition to UP's motion.⁶ PRFBA argues that UP failed to explain why UP's concerns about disclosure were not present under the Board's earlier reporting requirements; that the type of information requested by the Board is similar to information disclosed by carriers in other publicly accessible reports; and that UP's recent actions, including furloughs, demonstrate that UP is reducing its workforce to artificially lower its operating ratio. (PRFBA Letter 2.)

DISCUSSION AND CONCLUSIONS

The Board will deny UP's motion for a protective order. UP states in its motion that its proposed protective order follows the substance and format of the protective order entered in Docket No. EP 772, Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes (UP Embargoes Hearing). It argues that the proposed order—which includes a provision for designating information as "Confidential Commercial Information" and

⁶ PRFBA's late-filed letter will be accepted in the interest of a more complete record.

withholding that information from any disclosure outside of the Board—is appropriate here because this proceeding, like the UP Embargoes Hearing, is an oversight proceeding, which is non-adversarial and where no other parties require access to such information to present their case. (UP Mot. 1-2); see also UP Embargoes Hearing, EP 772, slip op. at 5 (STB served May 15, 2023). In approving the protective order in UP Embargoes Hearing, the Board recognized that “this type of protective order is not appropriate for all proceedings” and that “the general public has an interest in Board proceedings being as open and transparent as possible.” UP Embargoes Hearing, EP 772, slip op. at 5 & n.11. However, the Board determined that, in that case—where the focus was the Board’s understanding of UP’s substantial increase in its use of embargoes—the interest of UP in protecting its more sensitive commercial information outweighed the interest of other parties in being able to provide outside counsel or consultants with a subset of UP’s sensitive commercial information for use in that proceeding.

The Board cannot reach the same conclusion here. Not only is there no apparent basis for information to be withheld as “Confidential Commercial Information,” there is no apparent basis for a protective order. The Board made clear in its May 6, 2022 Order that the purpose of this proceeding was to “promote industry-wide transparency, accountability, and improvements in rail service.” May 6, 2022 Order, EP 770 (Sub-No. 1), slip op. at 4. The Board stated that the required reporting would “give the agency *and stakeholders* access to data needed for a more timely understanding of the extent and location of the acute service issues and labor and equipment shortages” and plainly stated that the data “will be publicly available.” Id. (emphasis added). As the Board explained in its January 31, 2024 Order (and the carriers themselves acknowledged at the April 2022 hearing⁷), the service crisis that necessitated this proceeding was due in large part to a significant reduction in workforce levels by the Four Carriers, which left them unable to handle the last significant increase in traffic that came when the economy began to recover in late 2020. See Jan. 31, 2024 Order, EP 770 (Sub-No. 1), slip op. at 8. The Board noted that while overall performance data has improved since the proceeding commenced, continued reporting and transparency is warranted to monitor whether the railroads will have a sufficient workforce to handle increased demand in a satisfactory manner.⁸ See id. at 7-8. Granting UP’s motion, especially at this juncture, would undermine the very purpose of this proceeding. (See FRA Letter 3, Feb. 29, 2024 (explaining that limiting access to the data will undermine transparency).)

Additionally, UP has failed to adequately explain why the type of information and data it has been reporting publicly since 2022 now requires confidential treatment. Indeed, neither UP nor any other carrier expressed confidentiality concerns when submitting this data previously.

⁷ See, e.g., Hr’g Tr. 269:2-271:9 (NSR), 404:15-407:20 (CSXT), Apr. 26, 2022, Urgent Issues in Freight Rail Serv., EP 770; Hr’g Tr. 789:1-789:9 (BNSF), 815:19-817:19 (UP), Apr. 27, 2022, Urgent Issues in Freight Rail Serv., EP 770.

⁸ As of the January 31, 2024 Order, employment levels at the Four Carriers are approximately 14,000 below pre-pandemic levels from September 2019, total employment levels at the Four Carriers have been essentially flat for the past six months, and the data in this docket show that certain carriers have been recently reducing their workforces through furloughs. Jan. 31, 2024 Order, EP 770 (Sub-No. 1), slip op. at 8.

UP states that, as a “temporary practice,” it did not object to the public release of the data due to “unique and transitory market considerations that are no longer in effect.” (See UP Status Report, Letter 4, Feb. 15, 2024.) However, UP does not describe what those “unique and transitory market considerations” are or why they are no longer in effect, nor has it explained why public availability of the data should depend on the existence of these “market considerations.”⁹ Given UP’s failure to explain why market conditions should determine whether the submitted material is treated as confidential, UP has not substantiated its motion for a protective order.

For these reasons, UP’s motion for protective order will be denied. UP will be directed to file, by no later than March 19, 2024, public versions of its February 15 and February 29 submissions, consistent with this decision.

It is ordered:

1. UP’s motion for protective order is denied.
2. UP shall file, by no later than March 19, 2024, public versions of its February 15 and February 29 submissions, consistent with this decision.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁹ In its February 15 and February 29 submissions, UP argues that its monthly employment data are exempt from public disclosure under Exemption 4 of FOIA. (See UP Status Report, Letter 3-5, Feb. 15, 2024; UP Second Interim Update, Letter 2, Feb. 29, 2024.) Because there is no pending FOIA request, the Board need not address this argument.