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February 10, 2014

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February 10, 2015
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BY E-FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a) – Canadian National Railway Company (Docket No. FD 35743)*

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find the Report of Illinois Central Railroad Company and Grand Trunk Western Railroad Company on Status of Third Motion to Compel.

Very truly yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company and
Grand Trunk Western Railroad Company

cc: Linda J. Morgan, Esquire
William H. Herrmann, Esquire

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

**REPORT OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD COMPANY
ON STATUS OF THIRD MOTION TO COMPEL**

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*Counsel for Illinois Central Railroad Company
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February 10, 2015

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

**REPORT OF ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD COMPANY
ON STATUS OF THIRD MOTION TO COMPEL**

As directed by the Board’s February 3, 2015 order, Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”) submit this report on the status of Amtrak’s production of ridership and revenue database information pursuant to CN’s Third Motion to Compel (“Motion”). Amtrak recently produced the *ridership* database information for Amtrak passenger services operated on CN lines during the agreed period (May 1, 2011 through Oct. 31, 2013), rendering that portion of the Motion moot. However, Amtrak has failed to produce any *revenue* information in response to the Motion. CN therefore respectfully requests the Board to: (1) grant the Motion with respect to revenue information and order Amtrak to produce the full revenue database fields from its database; and (2) dismiss the Motion as moot with respect to ridership database information.

AMTRAK’S DECEMBER 10 REPLY AND SUBSEQUENT DEVELOPMENTS

As noted in the Board’s February 3 Order, Amtrak replied to CN’s Motion on December 10, 2014 that it was “willing to produce substantially all of the additional information” CN had requested in the Motion. Amtrak stated that it would produce “the ridership *and revenue fields* of its database identified by Amtrak in Exhibit 3” of the Motion for its services run in whole or in part on CN lines within the agreed time period, “excluding any individual ticket pricing data.”

Reply at 7-8 (emphasis added). Amtrak did not state it would omit all revenue information from this production.

On December 18, counsel held a meet-and-confer session to discuss several outstanding Amtrak discovery issues, including the database production. Amtrak's counsel identified three database fields that contained individual ticket pricing information which would be excluded, but expressed the belief, in response to CN's counsel's specific inquiry, that the information that would be provided would permit CN to derive revenues on a segment-specific basis. CN therefore awaited Amtrak's production so that it could assess the adequacy of the revenue information Amtrak intended to produce.¹

Amtrak transmitted the files containing its database production to CN on January 20 and January 29. Counsel agreed to hold a meet-and-confer session on the afternoon of Friday, January 30, immediately following CN's receipt of Amtrak's second transmission, to address questions CN might have about the production as well as the status of Amtrak's other outstanding document production obligations.² Three hours before the meet-and-confer was set to begin, however, Amtrak's counsel cancelled the session and requested CN's counsel to "send

¹ It was evident from Amtrak's prior production that it could produce in aggregated form the data sought by CN (*i.e.*, ridership revenue by month, by train, and by station segment), as its production contained examples of it having done so for some trains and some months. *See* Motion (Highly Confidential version), at Exhibit 16, ATK0000151652 (July 2013 Trains, Michigan Train Route Data).

² Amtrak has repeatedly acknowledged to CN that Amtrak has multiple outstanding discovery obligations, which are reflected in various exhibits to the Motion and in emails exchanged by counsel on January 30 and February 3 (attached hereto as Attachments 1 and 2). These obligations are not new; they relate to Amtrak's undertaking to rectify errors and deficiencies in its initial productions that resulted in its failure to produce relevant, responsive documents. At around 3 p.m. today, CN's counsel received a letter from Amtrak's counsel (Attachment 3) conceding that Amtrak has still not complied with the Board's September 23, 2014 order with respect to delay reporting documents and data, but abruptly reversing Amtrak's prior acknowledgements that the remaining issues relate to the discovery initially propounded by CN (*i.e.*, that they are not related to new CN discovery requests) and refusing to follow through on various prior commitments related to these document production issues.

us any questions you have about the data via email” instead. *See* Attachment 1. CN’s counsel agreed to do so, noting that he might also include a list of other outstanding Amtrak production issues. *Id.*

On February 3, CN e-mailed its questions to Amtrak, noting that “there appears to be no revenue data in the files we received.” Attachment 2. CN also noted that Amtrak’s December 10 Reply had not indicated Amtrak would omit all revenue information from its database production, and that Amtrak’s counsel had stated at the December 18 meet-and-confer session that she believed CN would receive revenue information from the database that would permit segment-specific analysis. CN invited Amtrak to correct or reconsider its failure to produce any revenue information, and requested Amtrak to notify CN of its position by February 5 in order to give CN time to formulate an accurate current status report to the Board today in accordance with the Board’s February 3 order.

At approximately 3 p.m. today – two hours before the status report filing deadline – Amtrak responded to CN and advised that it would not voluntarily produce the database revenue data. Attachment 3. Amtrak claims (at page 2) that it has “produced exactly the data for the relevant time period that it said it would produce,” but that claim cannot withstand scrutiny. Amtrak stated in response to CN’s Document Request No. 17 that, subject to boilerplate objections, it would produce documents responsive to CN’s request for “all documents relating to passenger ticket revenue generated by Amtrak on the Relevant Services, and on each segment thereof, including but not limited to any data, measurements, analyses, estimates, or projections of revenue on particular trains and between particular segments and any analyses of revenue trends or factors affecting revenue.”³ Moreover, Amtrak stated, in its December Reply, that it

³ Far from providing a basis for withholding its revenue data, Amtrak’s boilerplate response to Request for Production 17 (revenue data) was substantively identical to its response to Request for Production 16 (ridership data), which ridership data Amtrak finally produced. It

would produce “the ridership *and revenue fields* of its database identified by Amtrak in Exhibit 3” of CN’s Motion, subject to a qualification relating only to pricing data. Reply at 7-8. And at the December 18 meet-and-confer session, Amtrak indicated CN could expect revenue data from the database. Amtrak’s reversal of position and its refusal to produce revenue data are inexcusable.

REQUESTED ACTION

As detailed in CN’s Motion, the revenue information Amtrak has withheld is responsive, non-duplicative, and directly relevant to the issues in this proceeding.⁴ See Motion at 2-3, 10-12. Amtrak and the FRA have both argued that host railroad performance affects Amtrak’s revenues and that host railroad compensation, including contractual incentives and penalties, should take revenues into account. The location-specific distribution of revenues is relevant to determining contractual incentives and penalties, including the proper measure of on-time performance (“OTP”) (potential measures include “endpoint” OTP, “all-stations” OTP, and OTP at selected stations). CN therefore needs this basic and important information in order to prepare its opening submission on performance payments and penalties.⁵

should do the same for its corresponding revenue data. Further, the Board should not be misled by Amtrak’s efforts to conflate revenue data and pricing data. Amtrak’s Reply did not state that it would withhold revenue data (just pricing data) and its objection to Request for Production 18 was not with respect to revenue data (just pricing data).

⁴ As discussed in the Motion, Amtrak provided incomplete snippets of revenue data in various formats in its *earlier* productions, but those snippets are no substitute for providing the complete revenue data for the full relevant period across its database so that they can be searched, queried, and related to the specific train ridership data Amtrak has at last produced. See Motion at 11-12.

⁵ Contrary to Amtrak’s suggestion (Reply at 6-7), CN never stated that its need for revenue data was limited to assessing the performance payment and penalty proposals presented in Amtrak’s opening submission. At the November 19 discovery conference, when Amtrak’s counsel suggested that was CN’s sole need (and that CN therefore should await and rely on the workpapers that would accompany that submission), CN’s counsel explained that it needed these data to inform its own proposals in its own, simultaneous opening submission. Indeed, CN

There is no basis for Amtrak to withhold any revenue database information relating to the services it operates on CN's lines. The information is readily accessible, is used by Amtrak in the regular course of business, and would not be unduly burdensome to produce. Amtrak's December 10 Reply does not dispute these points.⁶ Rather, Amtrak stated that it would "produce substantially all of the additional information" requested by CN in the ridership and revenue fields of its database, but exclude "any individual ticket pricing data" which "CN has provided an insufficient basis for needing." Reply at 7-8.

CN would have been amenable to Amtrak excluding "individual ticket pricing data" if Amtrak had produced the revenue data needed by CN to derive passenger revenues earned by Amtrak by train, by station, and by segment for the Amtrak passenger services operated on CN lines. Amtrak, however, did not produce such revenue data. CN has waited for over 15 months for Amtrak's revenue data, including two additional months since its Motion. At this point, the time for uncertain and unexplained half-way measures has passed and Amtrak should be ordered to produce from its database all revenue data for the relevant movements.

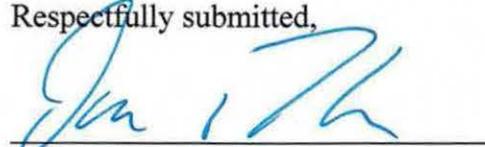
identified the subject of performance payments and penalties as a disputed issue in its initial filing in this proceeding. *See* CN Statement Identifying Disputed Issues (filed Oct. 24, 2013), Issue 2 ("Whether the provisions of the Operating Agreement relating to performance payments and penalties, including the formulation and administration thereof, should be modified, and, if so, how."). Amtrak did not object to CN's request for segment-specific revenue data in Request for Production 17 on either relevance grounds or on the ground that CN should await Amtrak's production of workpapers.

⁶ Amtrak's assertion that the data are "highly proprietary" and "commercially sensitive" (Reply at 3-4) is a red herring. The Protective Order provides ample protection against unauthorized or unintended disclosure.

CONCLUSION

For the reasons stated above and in its Third Motion to Compel, CN respectfully requests the Board to (1) grant the Motion with respect to revenue information and order Amtrak to produce the full revenue database fields from its database; and (2) dismiss the Motion as moot regarding ridership database information. If Amtrak is not ordered to produce the revenue data requested by CN, CN requests that Amtrak be precluded from using in this proceeding any of the revenue data it has withheld.

Respectfully submitted,



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*Counsel for Grand Trunk Western Railroad Company
and Illinois Central Railroad Company*

February 10, 2015

Attachment 1



Re: Amtrak/CN - Meet and Confer 
David A. Hirsh to: Rollins, Graham
Cc: "Morgan, Linda J."

01/30/2015 11:40 AM

Graham,

I was surprised by your cancellation of our meet and confer scheduled for this afternoon. Nonetheless, as you request, I will send you our questions regarding the data rather than discussing them by phone. I may also include a list of other Amtrak production issues.

Best regards,

David

"Rollins, Graham"

Good morning David, You all have the data we've...

01/30/2015 10:53:22 AM

From: "Rollins, Graham" <grollins@morganlewis.com>
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>
Cc: "Morgan, Linda J." <lmorgan@nossaman.com>
Date: 01/30/2015 10:53 AM
Subject: Amtrak/CN - Meet and Confer

Good morning David,

You all have the data we've produced from the ridership and revenue data and we're continuing to work on other items. Rather than meeting this afternoon, will you please send us any questions you have about the data via email? We will separately send a follow up on other discovery matters.

Regards,

Graham

Graham Rollins

Morgan, Lewis & Bockius LLP

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Attachment 2



Fw: Amtrak/CN - Meet and Confer

David A. Hirsh to: grollins

Cc: Imorgan

02/03/2015 07:18 PM

Graham,

As noted in my last email, we were surprised by your late cancellation of our meet and confer scheduled for Friday afternoon. Nonetheless, as you requested, we list below our current questions concerning the data that you have produced from Amtrak's "ridership and revenue" database in response to CN's Third Motion to Compel ("Motion"). In addition, as I noted in my last email, we also provide a list of other outstanding discovery matters.

1. Ridership and Revenue Database Production

We presently have one minor and one major issue with Amtrak's production in response to CN's Third Motion to Compel.

The minor issue is that we would ask that you provide the tables that identify and explain the meaning of the codes associated with the database field names ending in "CD."

The major issue is that there appears to be no revenue data in the files we received. CN explained in the Motion and reiterated at the December 16 meet and confer that it needs and is entitled to revenue data that can be organized on a train-specific, station-specific, and segment-specific basis. The static revenue reports previously produced by Amtrak do not contain such data, which is a major reason why CN moved to compel production of the ridership and revenue database in the first place.

In its Reply, Amtrak responded that it would "produce substantially all of the additional information" sought by CN, "[s]pecifically, . . . the rider and revenue fields of its database . . . excluding any individual ticket pricing data." (Amtrak Reply at 7-8) Amtrak did not state in its Reply that it intended to exclude from its "ridership and revenue" database production any and all revenue data - as it could and should have stated if that was its intention. Moreover, that position is contrary to the discussion we had at our last meet and confer on December 16, when Linda said she thought we would be receiving revenue information from the database that would permit a segment-by-segment analysis. In any event, there is no basis for Amtrak withholding any of the revenue information we have requested because it is unquestionably relevant and its production would not be overly burdensome.

We hope that withholding all such revenue was not Amtrak's intention, or if it was, that Amtrak will reconsider its position and produce the requested revenue data from its revenue and ridership database. Please let us know Amtrak's position on this issue by the close of business on Thursday (February 5), so that we can respond to the Board's new order directing the parties to report by February 10 on the status of Amtrak's production pursuant to the Third Motion to Compel.

2. Other Pending Amtrak Production Issues

With respect to other Amtrak production issues, it seemed helpful to compile a list of the issues we have discussed at past meet and confers that remain outstanding. According to our notes, we are awaiting responses on the following:

1. Production of any updated cost data for Amtrak's Conrail and Buckingham Branch host agreements, or confirmation that there is none.
2. Identification or production of the Policy and Procedures Manual referenced in ATK0000126036 (which Linda thought had been produced but we are unable to locate).

3. Re TDRS: (i) whether, when an incorrect coding issue is discovered and a code change is made, a TDRS field shows what the change is; and if not, (ii) identification of the depository (in TDRS or elsewhere) that contains this information. (As discussed at our last meet and confer, this information is needed in order to determine what must be produced from TDRS in response to the Board's September 23 order and whether Amtrak needs to supplement its production from TDRS with information from other central repositories.)
4. A description of the contents of the Host Railroad Issue Log referenced in ATK0000126036, at 38, and whether Amtrak intends to produce it.
5. Whether Jason Maga has notes from the November 29, 2011 meeting re Conductor Delay Reports (see agenda at ATK0000031015). Similarly, we note that we seem to have no notes from agreed custodians for the meetings referenced in the following documents:

ATK0000084610 (referencing 11-17-09 conference call re cost impacts of PRIIA OTP metrics and listing Genge, Sundman, Cunning, and McDonough as Required Attendees)

ATK000048493 (referencing 4-4-12 conference call re Strategic Plan and PRIIA metrics and listing Genge and Sundman as Required Attendees)

ATK0000044744 (referencing Outlook meeting invitation re 6-23-08 conference call scheduled with FRA re OTP metrics sent to Maga, Blair and Genge)

Did Amtrak's search encompass such notes?

6. With respect to the missing attachments issues: (i) production of the stub attachments identified in your email of January 20 and requested in our email of January 21; (ii) production of the additional missing attachments that you and we independently discovered and discussed on December 16 (which we believe comprise approximately 34 documents, examples of which are ATK0000125827 and ATK0000211527); and (iii) correction of metadata errors showing 0 attachments where attachments have in fact been produced (also discussed on Dec. 16).
7. The scope of the search conducted to identify responsive information located within Amtrak's intranet or other central repositories, and production of any related responsive materials, such as the items listed in my email of December 19. We have recently come across references to two additional systems maintained by Amtrak - its eTrax approval system (*see, e.g.*, ATK0000102476; ATK0000063780) and the Amtrak Performance Tracking (ATP) System (*see, e.g.*, ATK0000118902) that should also be included in this inquiry.
8. Whether Amtrak has updated its Business Plan since the one produced for FY08; and production of the Strategic Plan(s) referenced in ATK0000173475 and ATK0000050607.
9. Copies of the Monthly Performance Reports for Dec. 2011, Dec. 2012, and Oct. 2013.
10. The operating forecast referenced in ATK0000215625, which you indicated at our December 16 conference had been inadvertently omitted from the last production and would be included with the production that will be made pursuant to the Board's September 23 Order.

We would appreciate an update on these additional issues as soon as possible.

Thanks,

David

----- Forwarded by David A. Hirsh/Harkins Cunningham/US on 02/03/2015 06:48 PM -----

From: David A. Hirsh/Harkins Cunningham/US

To: "Rollins, Graham" <grollins@morganlewis.com>
Cc: "Morgan, Linda J." <lmorgan@nossaman.com>
Date: 01/30/2015 11:40 AM
Subject: Re: Amtrak/CN - Meet and Confer

Graham,

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Best regards,

David

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Regards,

Graham

Graham Rollins

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Attachment 3



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February 10, 2015

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*Re: STB Finance Docket 35743 - Application of the National Railroad
Passenger Corporation under 49 U.S.C. § 24308(a)*

Dear David,

This letter reviews where we stand with respect to discovery in this case. CN and Amtrak have met a number of times since the STB's September 23, 2014 decision and Amtrak has produced a large volume of documents in addition to what it had already produced. Following up on our meet and confer on December 18, 2014, Amtrak is preparing productions related to delay reporting to comply with the September 23rd decision. With respect to previous productions, Amtrak has supplemented them in response to CN's requests insofar as CN's requests have been within the scope of what we agreed to produce in our responses to CN discovery requests and Board orders. During our meetings, CN has made numerous additional requests not encompassed in the Board's September 23rd decision that are duplicative, unduly burdensome, and/or outside the scope of our agreed upon discovery. To clarify Amtrak's position with respect to these requests, we summarize below what Amtrak has produced and what further it intends to produce.

1. Operating Agreements

Amtrak has made several productions of operating agreements to comply with the Board's April 15, 2014, and September 23, 2014 decisions. CN indicates that it believes there are additional amendments to these agreements, in particular for agreements with Conrail and Buckingham Branch. Amtrak has completed an extensive search to identify additional amendments to all the agreements and has produced those additional materials. CN now has all the documents within this category that Amtrak has been able to locate.

2. Ridership and Revenue Data

Pursuant to Amtrak's Reply to CN's Third Motion to Compel, filed December 10, 2014, Amtrak has produced ridership and revenue data for the Amtrak trains that run on CN's lines. As discussed during our December 18 meet and confer, Amtrak has withheld three fields that would disclose pricing and ticket-specific revenue, as per Amtrak's objections to CN's Requests for Production 16 and 17 (ridership and revenue data), and Request for Production 18 (pricing data). Amtrak has designated the data that it has produced as "Highly Confidential" because of its proprietary and commercially sensitive nature. In your email of February 2, 2015, you complain about the lack of revenue information in what Amtrak has produced. However, Amtrak has produced exactly the data for the relevant time period that it said it would produce in its Reply and as discussed in our follow up meet and confer. Related to this production, you have also asked for the definition of certain codes, which we will be producing forthwith.

3. Delay Reporting Documents

As already mentioned, Amtrak is preparing productions to comply with the Board's September 23, 2014 decision, based on the custodians and search terms agreed upon by CN and Amtrak and also based upon our discussions of specific data sources, including TDRS (Transportation Department Review System).

4. Email Attachments

Amtrak has produced several thousand email attachments that were initially withheld as non-responsive from its previous productions. At CN's request and at Amtrak's expense, Amtrak re-reviewed and produced the approximately 3,000 previously withheld attachments. CN has now identified a small number of additional as yet unproduced attachments that they believe to be responsive. Amtrak is preparing these documents for production to the extent that they are responsive as it did with the other previously unproduced attachments.

5. Stubbed Attachments

As discussed during our December 18 meet and confer, the email stubs that are part of Amtrak's production are the result of a data migration process that was underway within Amtrak at the time of the collection. Amtrak has confirmed that it has not lost any of these documents, but re-collecting them individually or performing a large-scale re-collection for purposes of producing these 147 documents is unduly burdensome. The former would be time and resource intensive for Amtrak personnel, and the latter would incur substantial processing costs to re-process large amounts of data a second time. When we discussed this issue, you agreed to review the list of stubbed attachments to identify files you would like produced. In your email dated January 21, 2015, you asked that we produce all 147 of them. As discussed above, this would require a substantial effort by Amtrak to produce a relatively small number of

documents. Amtrak does not intend to produce the balance of these documents as a result.

6. Other Documents and Data Sources

As summarized in your email from February 2, 2015, CN has continuously made new requests for additional production of documents and from data sources. These include documents related to the “host railroad issue log,” Amtrak’s Intranet, a policy and procedures manual, notes from several meetings, business plans, monthly performance reports, and operating forecasts. Amtrak views any further production on these topics as duplicative and burdensome. In connection with Amtrak’s earlier productions, Amtrak will not pursue any further production on these topics. Amtrak and CN agreed upon a list of custodians and searches to be run against those custodians’ documents, and Amtrak has produced the results of those searches. In addition, Amtrak has supplemented its productions at CN’s request and at Amtrak’s expense, as discussed in the foregoing sections.

In summary, Amtrak’s intent is to comply with its discovery obligations in this proceeding and to move the matter forward to resolution. Amtrak has sought to cooperate with CN by supplementing its productions and investigating questions as they arise, but your most recent requests for additional supplemental productions suggest that you view Amtrak’s duty as an open-ended commitment to be extended *ad infinitum* with serial supplemental requests. Amtrak does not view its discovery obligations this way. Amtrak will complete its productions as outlined above.

Sincerely,



Linda J. Morgan

Attorney for National Railroad Passenger Corporation

CERTIFICATE OF SERVICE

I certify that I have this 10th day of February, 2015, caused a true copy of the foregoing Report of Illinois Central Railroad Company and Grand Trunk Western Railroad Company on Status of Third Motion to Compel to be served by e-mail upon:

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William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
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Spencer R. Leroux