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March 25, 2015

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
March 25, 2015
Part of
Public Record

**Re: Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer-
Petition for Exemption (STB Docket No. FD 35851)**

Dear Ms. Brown,

National Railroad Passenger Corporation (Amtrak) is e-filing the attached Petition to Intervene and Comments in the matter of **Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer – Petition for Exemption (STB Docket No. FD 35851)**.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "William H. Herrmann", with a long horizontal flourish extending to the right.

William H. Herrmann
VP and Managing Deputy General Counsel
National Railroad Passenger Corporation (Amtrak)

Attachment

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35851

GREAT CANADIAN RAILTOUR COMPANY LIMITED
D/B/A/ROCKY MOUNTAINEER –
PETITION FOR EXEMPTION FROM 49 USC SUBTITLE IV

PETITION TO INTERVENE AND COMMENTS OF
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Pursuant to 49 CFR §1112.4, National Railroad Passenger Corporation (“Amtrak”) respectfully requests that it be permitted to intervene in the above-captioned proceeding for the limited purpose of clarifying and supplementing the record regarding Amtrak’s statutory right to operate special trains and charter trains under 49 U.S.C. §24308.

The Petition in this matter was filed by Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer (“Rocky Mountaineer”), requesting Board authorization to operate rail passenger service for that portion of its excursion service that runs between Vancouver, British Columbia and Seattle, Washington (the “Seattle extension”), and requesting an exemption from all common carrier obligations in Subtitle IV permitted by statute. Rocky Mountaineer has contracted with Amtrak to provide train and engine crews for the Seattle extension on the Bellingham Subdivision rail lines owned by BNSF Railway Company (“BNSF”).

Amtrak takes no position with regard to the merits of Rocky Mountaineer’s Petition for authorization and exemption. However, Amtrak does have an interest in having its rights to operate charter and special trains over the tracks of host freight railroads acknowledged and reflected in the record, and given due consideration to the extent they are at issue in this matter.

Specifically, in its Reply of BNSF Railway Company to Petition for Exemption dated November 20, 2014, BNSF asserted (at p.4): “[A]bsent BNSF agreement for Amtrak to operate [Rocky Mountaineer] trains over the Bellingham Subdivision, [Rocky Mountaineer] will have no legal basis for continuing its service, whether or not it has Board-issued operating authorization or exemption of the type sought here.”¹ In its Decision dated March 4, 2015, the Board noted BNSF’s legal assertion and ordered Rocky Mountaineer to submit a reply to BNSF’s filing, addressing *inter alia* the question of

why an exemption permitting its proposed operations should be granted when Rocky Mountaineer has no contract with BNSF to operate over the line, BNSF argues that its agreement with Amtrak does not allow for Rocky Mountaineer’s use of the line, and BNSF opposes the petition for exemption.

Decision at p. 2. Rocky Mountaineer’s reply is due March 27, 2015.

BNSF’s assertion that there is no legal basis for the Amtrak’s operation of charter service on behalf of a private party, absent a specific agreement with BNSF to do so, is inconsistent with the ICC’s holdings in cases such as *Amtrak and Soo Line Railroad – Use of Tracks and Facilities and Establishing Joint Compensation*, FD No. 31062 (ICC served June 25, 1987), and *Amtrak and Wisconsin Central Ltd. – Use of Tracks and Facilities and Establishing Just Compensation*, FD No. 31306 (ICC served July 29, 1988) (copies attached). In both cases the ICC, noting the intent of Congress to encourage Amtrak to enter into contracts with private entities to operate charter trains, as evidenced in the Rail Passenger Service Act, 45 U.S.C. § 501(a)(14), granted

¹ BNSF’s brief states (at p. 3) that BNSF has not received a request from Amtrak to operate the Seattle extension trains in 2015. Although that statement was correct at the time of the filing, as of this date Amtrak requested, and BNSF has granted, authorization to operate 12 charter trains on Petitioner’s behalf in 2015.

Amtrak's petition to operate special or charter trains over the lines of freight railroads, without reliance on the existence of any contract between Amtrak and the freight railroad to do so.²

Congress's intent in enacting the RSPA was to give Amtrak the right to operate all aspects of intercity passenger rail service that had been previously been provided by private railroads.³ The operation of special or charter trains for third parties has been an integral component of intercity passenger rail service in the United States since long before Amtrak began service in 1971. Charter train operations date to at least the first decade of the 20th century, when the Union Pacific Railroad first operated a charter train for the Denver Post from Denver to Cheyenne's 1908 Frontier Days. Amtrak's first regular charter operation was the Oakland-to-Reno *Reno Fun Train* previously operated by Southern Pacific. More than 50 years later, Amtrak continues to operate the *Fun Train* over Union Pacific tracks on behalf of a third party. Amtrak has operated thousands of other one-time, seasonal, and regularly-scheduled charter and special trains throughout the United States under contracts with a variety of entities, including private companies, state and municipal governments, and non-profit organizations.⁴

² Amtrak takes no position in this Petition to Intervene with respect to BNSF's assertion that the Amtrak/BNSF Operating Agreement would not permit operation of the Seattle extension on BNSF's rail lines. However, it should be noted that the National Arbitration Panel held that Burlington Northern, BNSF's predecessor, was "required to provide special passenger train service to Amtrak pursuant to the BN Basic Agreement and in accord with the compensation structure contained in that Agreement," and directed BN to provide such service. *National Railroad Passenger Corp. v. Burlington Northern, Inc.*, NAP Case No. 62 (1984) (copy attached).

³ See *Application of National R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pacific RR and Southern Pacific Transp. Co.*, 3 S.T.B. 143, 150-52 and n.16 (Amtrak's right to transport "express" shipments should not be interpreted more restrictively than the rights of private railroads prior to the formation of Amtrak).

⁴ For further discussion of Amtrak's history of charter train operations, see, e.g., Patterson, Steve and Kenton Forrest, *Rio Grande Ski Train* (Tramway Press 1984), pp. 18-22, 23; Hilton, Spud, "Train through Sierra a moving party," USA Today, February 2006 (http://usatoday30.usatoday.com/travel/destinations/2006-02-01-reno-fun-train_x.htm); Frailey, Fred W., *Zephyrs, Chiefs and Other Orphans*, RPC Publications, pp. 22, 174.

Finally, Congress recently restated Amtrak's right to access freight railroad tracks for the purpose of operating charter trains in the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"). Section 216 of PRIIA, codified at 49 U.S.C. §24308 *note*, affirmatively encourages Amtrak "to increase the operation of trains funded by, or in partnership with, private sector operators through competitive contracting to minimize the need for Federal subsidies," and in furtherance thereof directs Amtrak to "utilize the provisions of section 24308 of title 49, United States Code, when necessary to obtain access to facilities, train and engine crews, or services of a rail carrier or regional transportation authority that are required to operate such trains."

Amtrak's position is that the record should reflect applicable decisional and statutory law with respect to its right to operate charter and other special trains on host railroad tracks. Amtrak's intervention would neither unduly broaden the issues in this proceeding, nor contribute to any delay in the procedural schedule or in the resolution of this proceeding. For the reasons herein stated, Amtrak's petition to intervene should be granted, and this filing should be accepted into the record.

Respectfully submitted,



William H. Herrmann
Managing Deputy General Counsel
National Railroad Passenger Corporation
60 Massachusetts Avenue, N.E.
Washington, D.C 20002

*Counsel for National Railroad
Passenger Corporation (Amtrak)*

Dated: March 25, 2015

ATTACHMENT

**INTERSTATE COMMERCE COMMISSION'S
DECISION IN FINANCE DOCKET NO. 31062
(AMTRAK AND SOO LINE RAILROAD)**

JUN 29 1987

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31062

AMTRAK AND SOO LINE RAILROAD -- USE OF TRACKS AND FACILITIES AND
ESTABLISHING JUST COMPENSATION

Decided: June 25, 1987

We will grant the application filed on June 11, 1987, by the National Railroad Passenger Corporation (Amtrak) under section 402(a)(1) of the Rail Passenger Service Act, as amended (RPSA), 45 U.S.C. 562(a)(1). The Soo Line Railroad (Soo) is required to provide Amtrak with access to its tracks and other facilities between Chicago and Oshkosh, WI, and to provide such services as are required by Amtrak for it to operate two special trains on August 1 and 2, 1987. Because of the inability of the parties to agree upon compensation, we will also institute a proceeding to determine just and reasonable compensation for the trip.

BACKGROUND

Amtrak filed this application with the Commission on June 11, 1987, after failing to come to an agreement with the Soo concerning the proposed operation of two special round-trip trains for the 20th Century Railroad Club of Chicago (Club) to transport passengers from Chicago, IL to an air show at the Oshkosh Airport in Wisconsin on August 1 and 2, 1987.

Amtrak presently operates regularly scheduled rail passenger service over part of the proposed route between Chicago Union Station and Duplainville, WI. This 102.2-mile segment was previously owned by the Milwaukee Railroad (Milwaukee) and is subject to an operating agreement (Basic Agreement) which Amtrak entered into with the Milwaukee and which was assumed by the Soo when it acquired the Milwaukee. There is no existing passenger service nor operating agreement over the Soo's line between Duplainville and the Oshkosh Airport, a distance of 69.4 miles.

On March 18, 1987, Amtrak submitted a proposed schedule to the Soo for the Club's trip to the air show and requested Soo's concurrence in operating the special trains on August 1 and 2, 1987. In a letter dated May 18, 1987, Soo declined the request to run special Amtrak trains between Duplainville and Oshkosh, WI.

In its application, Amtrak states that its Operating Engineering Task Force conducted an inspection trip on May 13 and 14, 1987, and has evaluated Soo's main line between Duplainville and Oshkosh. The Task Force concluded that the line is in excellent condition and, under present signaling, is suitable for the operation of passenger trains at 45 miles-per-hour. Amtrak submits that the proposed trip on behalf of the Club falls within the purposes of the RPSA and requests that we issue an order requiring the Soo to permit Amtrak to operate the special trains on the requested dates. It proposes that the terms and conditions of the present Amtrak-Milwaukee Road Agreement also be made applicable to the Duplainville-Oshkosh segment of the special train movement.

On June 18, 1987, the Soo filed a reply in opposition to Amtrak's application. Soo claims that the excursion trains will

create an impediment to its freight operations on the scheduled dates. It characterizes the excursion trip as "purely a recreational usage" and not for "legitimate freight or passenger transportation." Soo argues that Amtrak's request is not necessary to carry out the purposes of the RPSA and that the "excursion trains accommodate a mere casual private fascination with rail transport and do not serve to promote the larger public convenience and necessity...".

Soo's primary concern appears to be the liability issue. In the event of an accident, Soo believes that the potential liability with regard to passenger suits poses a very significant risk of loss for which it is not being adequately compensated. Soo is concerned about the position which Amtrak has taken in a January 4, 1987 Conrail collision limiting Amtrak's responsibility to indemnify Conrail for any losses attributable to negligence. Soo argues that Amtrak's interpretation that there exists an exculpation from responsibility outside the indemnity terms of the Basic Agreement in cases of gross negligence constitutes an avoidance of Amtrak's contractual obligations and a failure of consideration^{1/} rendering the Basic Agreement null and void. Soo argues further that Amtrak's position in the Conrail case evinces an anticipatory failure of consideration and breach of contract for any extensions of Amtrak's operations under the existing Basic Agreement. Soo also argues that Amtrak presently has no contractual right to operate its trains over non-former Milwaukee lines and states that it has no intention of entering into such an agreement respecting those lines. It is Soo's position that, without a contractual right to operate over the Duplainville to Oshkosh, WI part of its intended route, Amtrak cannot legally operate its excursion train.

Amtrak responded to Soo's objections in a pleading filed June 19, 1987. In regard to Soo's allegation that the operation of the special trains will interfere with its freight operations, Amtrak asserts that no interference will occur. Nevertheless, it states that it is willing to allow Soo to give priority to its own freight operations by having Amtrak special trains use the siding tracks in the event of "any meets." In response to Soo's argument as to the legitimacy of the rail travel, Amtrak replies that, under the RPSA, recreational travel is just as legitimate as business travel. According to Amtrak, a high percentage of its riders and revenues are derived from recreational travel, both on regularly scheduled and special trains. Finally, on the liability issue, Amtrak explains that its position in the pending dispute with Conrail over the January 4, 1987 accident involves an interpretation of the terms of the indemnification agreement which is consistent with decisional law. Amtrak submits that this issue is one for the courts to decide, and not the Commission.

DISCUSSION AND CONCLUSIONS

Under section 402(a) of the RPSA, Amtrak may contract with railroads for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Commission is empowered to order the provision of services or the use of tracks

^{1/} According to Soo's contractual theory, the railroads that entered into the Basic Agreement with Amtrak were motivated to dispense with their respective passenger operations due to the tremendous potential liability associated with it. Soo argues that to remove this element of consideration from the Basic Agreement is tantamount to a failure of consideration.

or facilities of the railroad by Amtrak if we find that doing so is necessary to carry out the purposes of the RPSA. The Commission may also fix just and reasonable terms of compensation.

The question to be decided is whether Amtrak's access to Soo's track under the circumstances presented is necessary to carry out the purposes of the RPSA. Amtrak argues that it is necessary and cites to one of the Congressional findings in the RPSA "that to the maximum extent feasible travelers in America should have the freedom to choose the mode of transportation most convenient to their needs."^{2/} Amtrak also points to one of the Congressional goals of the RPSA, which is that Amtrak "... undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies."^{3/}

Soo acknowledges that Amtrak's legislative directive is to maximize its revenues. Soo argues that such is to occur only when compatible with existing rail transportation movements. Soo attempts to minimize the importance of the proposed excursion trip in comparison to its own freight operations, stating:

to enable Amtrak to disrupt freight operations on an occasional basis to accommodate rail buffs in reality forces Soo and its customers to subsidize this unnecessary private service through liability exposure, expense and inconvenience. Soo submits that its use of these lines for freight operations is, of the two, truly necessary to carry out the rail transportation policy of the United States.

We are not required under the RPSA statute to elevate freight service over passenger transportation.^{4/} Likewise, there is nothing in that statute which distinguishes occasional recreational use from other passenger transportation. On the contrary, Congress amended the RPSA in 1979 by adding section 402(g) requiring Amtrak to enter into an industry-wide contract with the railroad industry in order to obtain the ability to run charter trains on a reasonable basis. It was the intent of Congress that Amtrak encourage the use of charter trains because such operations can, at a minimum, be run on a break-even basis.^{5/} Neither Amtrak nor the operating railroads were able to develop a constructive proposal for such an agreement and subsection (g) was eventually deleted after Congress determined that it was unnecessary in light of the "... current arrangement

^{2/} 45 U.S.C. 501(a).

^{3/} 45 U.S.C. 501a(14).

^{4/} In fact, under 45 U.S.C. 562(e), intercity or commuter passenger trains are to be given preference over freight trains in the use of any given line of track, junction, or crossing. Any railroad whose rights are affected with regard to freight train operation may file an application with the Secretary of Transportation requesting appropriate relief.

^{5/} H.R. REP. NO. 96-189, 96th Cong., 1st Sess. 32, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1198, 1212.

of working out the details of charter and special train movements
....^{6/}

The operation of special trains is thus contemplated by Congress as a legitimate and proper undertaking by Amtrak under the Act. We will not second-guess Amtrak's business judgment in deciding to operate the special trains for the Club. We find that an order requiring Soo to make available tracks to permit Amtrak to operate special trains between Chicago, IL and Oshkosh, WI, August 1 and 2, 1987, as sought by Amtrak is necessary to carry out the purposes of the RPSA and will not unduly interfere with Soo's use of its property to conduct normal freight operations. In fact, Amtrak has agreed that Soo may give its freight trains priority over this Amtrak operation.

With regard to the liability issue, Amtrak's litigation posture in an unrelated case has no bearing on the question of whether we should require Soo to provide Amtrak with the access and services it requests in this proceeding. Rather, it goes to the question of the compensation that Soo should receive for the risk it bears. Soo's allegation that it will not be adequately compensated for the risk of loss it may incur must be addressed in determining the amount of compensation to be awarded in this case.

The evidence of record does not contain sufficient information for us to determine what is just and reasonable compensation under the circumstances. We will initially order the compensation and indemnification suggested by Amtrak. We will also set the matter of compensation and indemnification for modified procedure. To ensure the development of a complete record, each party will file an opening statement and a reply. Final action on these matters will await a final decision on the evidence presented by the parties. Amtrak should be aware that the amount of compensation could be increased substantially based on the risk of loss factor.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The Soo Line Railroad must provide the National Railroad Passenger Service Corporation with those services, tracks, and facilities, including rights of access to track and facilities necessary to allow the latter to operate two special trains on August 1 and 2, 1987, between Chicago, IL and Oshkosh, WI.

2. The establishment of just and reasonable terms and conditions for the provision by the Soo Line Railroad of necessary services, tracks and facilities shall be handled under modified procedure. The parties must comply with the applicable provisions of 49 CFR 1112.1 through 10.

3. The National Railroad Passenger Service Corporation must compensate and indemnify the Soo Line Railroad in conformity with the terms and conditions of the present Amtrak-Milwaukee agreement.

4. This payment is not a final compensation. The terms finally determined will have retroactive effect to the dates of

6/ H.R. REP. NO. 99-149, 99th Cong. 1st Sess. 21 (1985). The deletion of subsection (g) was part of the Amtrak authorization bill (H.R. 2266) which passed the House on September 19, 1985. The provisions of the bill were added as an amendment to H.R. 3500, the "Consolidated Omnibus Reconciliation Act of 1985."

August 1 and 2, 1987, with proper consideration for those payments made by the National Railroad Passenger Corporation in accordance with ordering paragraph 3.

5. On July 20, 1987, the National Railroad Passenger Corporation and Soo Line Railroad shall submit verified statements on matters relating to just and reasonable terms and conditions for the operation of the special trains and the provision of services, tracks and facilities required. The National Railroad Passenger Corporation and the Soo Line Railroad shall file verified statements in reply by August 18, 1987.

6. This decision is effective on the date it is served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

(SEAL)

Noreta R. McGee
Secretary

ATTACHMENT

**INTERSTATE COMMERCE COMMISSION'S
DECISION IN FINANCE DOCKET NO. 31306
(AMTRAK AND WISCONSIN CENTRAL LTD.)**

INTERSTATE COMMERCE COMMISSION

JUL 29 1988

DECISION

Finance Docket No. 31306

AMTRAK AND WISCONSIN CENTRAL LTD. -- USE OF TRACKS AND FACILITIES
AND ESTABLISHING JUST COMPENSATION

Decided: July 29, 1988

We will grant the application filed on July 22, 1988, by the National Railroad Passenger Corporation (Amtrak) under section 402(a)(1) of the Rail Passenger Service Act, as amended (RPSA), 45 U.S.C. 562(a)(1). Wisconsin Central Ltd. (WC) is required to provide Amtrak with access to its tracks and other facilities between Duplainville and Oshkosh, WI, and to provide such services as are required by Amtrak for it to operate two special trains on July 30 and 31, 1988. Because of the inability of the parties to agree upon compensation, we will also institute a proceeding to determine just and reasonable compensation for the trip.

BACKGROUND

Amtrak filed this application with the Commission on July 22, 1988, after failing to come to an agreement with WC concerning the proposed operation of two special round-trip trains for the 20th Century Railroad Club of Chicago (Club) to transport passengers to an air show at the Oshkosh Airport in Wisconsin on July 30 and 31, 1988. The proposed route is from Chicago Union Station via the Soo Line Railroad (Soo) to Duplainville, WI, a distance of 102.2 miles, and from Duplainville via WC to the Oshkosh Airport, a distance of 69.4 miles.

Amtrak filed a similar application last year to transport the Club to the air show, which was granted by the Commission in Finance Docket No. 31062, Amtrak and Soo Line Railroad -- Use of Tracks and Facilities and Establishing Just Compensation (not printed), served June 29, 1987 (Amtrak and Soo Line). At that time, Soo owned the entire line over which the trains were to be operated. It subsequently sold the track, between Duplainville to Oshkosh, to WC.

According to Amtrak, it has an agreement with Soo for operation of the special trains between Chicago and Duplainville, however, it has reached an impasse in its negotiations with WC for the remainder of the trip between Duplainville and the Oshkosh Airport. On July 19, 1988, Amtrak was advised by WC that, in accordance with the terms of its bank credit agreement, it could not voluntarily offer passenger service without full indemnification. It requested a minimum of \$10,000,000 general liability protection. Amtrak declined to comply and filed this application seeking an order directing access.

In support of its application, Amtrak states that the proposed trips are identical to those authorized and directed by the Commission last year in Amtrak and Soo Line, supra. Amtrak notes that the Commission consistently has rejected railroad proposals for full indemnification against all risk of liability in the operation of Amtrak trains, finding that such proposals would contravene the dictates of the RPSA. It cites our prior

decisions^{1/} for the proposition that, unless the parties otherwise agree, apportionment of liability for the operation of Amtrak trains should be as stated in Amtrak's standard agreement with other railroads. In the alternative, it suggests that the Commission take no action on the issue of apportionment of liability, leaving the matter to common law remedies. Amtrak notes that the drawback of the common law solution is that it may breed lengthy and complicated disputes between railroads over causation and fault.

On July 26, 1988, WC filed its reply to Amtrak's application. It notes that, as a freight carrier, it has never provided regularly scheduled passenger service. WC states that as part of its agreement with its lenders, unless the Commission orders it to do so, it cannot provide passenger service without insurance to cover the risks associated with that type of transportation. It submits that the apportionment of liability sought by Amtrak is derived from Amtrak's standard agreement with Class I railroads that exchanged their deficit ridden passenger obligations for operating agreements with Amtrak. WC argues that, it has never been a certificated passenger carrier and, thus, has not benefited from the substantial economic relief enjoyed by those carriers as a result of the RPSA. It further argues that it should not have to automatically accept terms and conditions suited to Class I carriers. According to WC, it does not have the resources of a larger carrier to sustain the financial impact of a serious passenger accident. WC points out that the Commission has encouraged the creation of new carriers formed from the sale of light density lines of Class I carriers. It submits that this is a case of first impression, since this is the first time the Commission has been asked to impose Amtrak's standard Class I contract indemnity provisions on a new regional carrier. WC requests that the Commission order Amtrak to provide insurance coverage for at least \$10,000,000 and to adopt WC's alternative full indemnification language. Finally, WC argues that the proposed compensation for the excursion is substantially below the market rate and seeks compensation based on the fair market value for its services and the use of its tracks.

In a response filed July 26, 1988, Amtrak argues that contrary to WC's contention that the standard apportionment of liability provisions governing Amtrak operations have been limited in their application to Class I railroads relieved of the obligation to provide rail passenger service by section 401 of the RPSA, the Commission has imposed the same apportionment of liability provisions on railroads that did not enter into the Basic Agreement. With respect to the terms of compensation, Amtrak states that it is not aware of any basic disagreement between the parties. It has agreed to reimburse WC for all incremental costs relating to the special trains and, in addition, has offered incentive payments for on-time performance. Amtrak submits that section 402(a)(1) permits no more and that evidence of the market rate for such passenger excursions would be irrelevant under the governing statutory criteria. Nevertheless, it states that any disagreement as to terms can be resolved in a subsequent proceeding.

DISCUSSION AND CONCLUSIONS

Under section 402(a) of the RPSA, Amtrak may contract with railroads for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Commission is empowered to order the provision of services or the use of tracks or facilities of the railroad by Amtrak if we find that doing so

^{1/} Finance Docket No. 30426, National Rail Passenger Corporation Application Under Section 402(a) of the Rail Passenger Service Act (not printed), served July 15, 1985; Minnesota Transfer Ry. - Operation of Trains, 354 I.C.C. 552 (1978); and Amtrak and Tex. and P. Ry. Co., Just Compensation, 348 I.C.C. 645 (1976).

is necessary to carry out the purposes of the RPSA. The Commission may also fix just and reasonable terms of compensation. The question to be decided is whether Amtrak's access to WC's track under the circumstances presented is necessary to carry out the purposes of the RPSA.

In Amtrak and Soo Line, supra, we discussed the legislative history of the RPSA, particularly the intent of Congress that Amtrak encourage the use of charter trains. Having determined that the operation of special trains is contemplated by Congress as a legitimate and proper undertaking by Amtrak under the RPSA, we stated that we would not second-guess Amtrak's business judgment in deciding to operate the special trains for the Club. We adopt those findings here. Accordingly, we find that an order requiring WC to make available tracks to permit Amtrak to operate special trains between Duplainville and Oshkosh, WI, July 30 and 31, 1988, as sought by Amtrak is necessary to carry out the purposes of the RPSA.^{2/}

The evidence of record does not contain sufficient information for us to determine what is just and reasonable compensation under the circumstances. In fact there appears to be some disagreement between the parties on this point. However, we note that the general approach advanced by Amtrak (cost plus incentives for good performance) is required by Section 402 of the RPSA. We will initially order the compensation suggested by Amtrak. We will also set the matter of compensation for modified procedure. To ensure the development of a complete record, each party will file an opening statement and a reply. Final action on this matter will await a final decision on the evidence presented by the parties.

With regard to the matter of indemnification, we agree with WC that indemnification in this case is a matter of first impression. We do not believe it is reasonable to require a railroad whose property is being used, on a once a year or occasional basis, to be responsible for the nonwillful negligent acts of its employees. Therefore, we agree with WC that the liability apportionment provision in Amtrak's standard agreement is not appropriate under these circumstances and we will require Amtrak to indemnify WC against all but willful acts of negligence by WC employees.^{3/} Requiring Amtrak to indemnify WC in this manner moots the necessity for the Commission to order Amtrak to provide WC with insurance coverage.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The Wisconsin Central Ltd. must provide the National Railroad Passenger Corporation with those services, tracks, and facilities, including rights of access to track and facilities

^{2/} While we are expediting this decision as Amtrak requests, we caution it that we may decline to do so in the future. Amtrak's request was received for staff analysis on July 22. Amtrak thus afforded us only 6 working days to review the matter and issue a decision. Moreover, WC's participation is difficult, at best. Amtrak notes (Petition at 2) that it is committed to providing these special trains for the Club. Thus, it has known for quite some time that it would need to use these tracks. While we encourage private resolution of these disputes and note Amtrak's claim that it was not until July 19th that negotiations broke down, Amtrak could have requested this relief much earlier, as a protective measure in the event private resolution failed. In the future, we expect it to do so.

^{3/} WC's proposed indemnification provision does not distinguish between the willful negligence and ordinary negligence of its employees. Thus, we will not adopt its proposed language.

necessary to allow the latter to operate two special trains on July 30 and 31, 1988, between Duplainville and Oshkosh, WI.

2. The establishment of just and reasonable terms and conditions for the provision by the Wisconsin Central Ltd. of necessary services, tracks and facilities shall be handled under modified procedure. The parties must comply with the applicable provisions of 49 CFR 1112.1 through 10.

3. The National Railroad Passenger Corporation must compensate the Wisconsin Central Ltd. in conformity with the terms and conditions of the standard agreement which the National Railroad Passenger Corporation has with other railroads except as to indemnification.

4. This payment is not a final compensation. The terms finally determined will have retroactive effect to the dates of July 30 and 31, 1988, with proper consideration for those payments made by the National Railroad Passenger Corporation in accordance with ordering paragraph 3.

5. On September 2, 1988, the National Railroad Passenger Corporation and Wisconsin Central Ltd. shall submit verified statements on matters relating to just and reasonable terms and conditions for the operation of the special trains and the provision of services, tracks and facilities required. The National Railroad Passenger Corporation and the Wisconsin Central Ltd. shall file verified statements in reply by September 22, 1988.

6. The National Railroad Passenger Corporation is required to indemnify Wisconsin Central Ltd. against all but the willful acts of negligence of the employees of Wisconsin Central Ltd.

7. This decision is effective on the date it is served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley did not participate in the disposition of this proceeding.

(SEAL)

Noreta R. McGee
Secretary

ATTACHMENT

**NATIONAL ARBITRATION PANEL'S
DECISION AND ORDER IN NAP CASE NO. 62
(AMTRAK AND BURLINGTON NORTHERN, INC.)**

NATIONAL ARBITRATION PANEL

NATIONAL RAILROAD PASSENGER CORPORATION ("AMTRAK"),)	
Initiating Party,)	NAP Case No. 62
v.)	In re: Refusal to
BURLINGTON NORTHERN, INC.,)	Operate Special
Answering Party.)	Passenger Trains

DECISION AND ORDER

This case was initiated by the National Railroad Passenger Corporation ("Amtrak") on June 8, 1984 by filing its entire written case. Amtrak at that time requested the Panel to give the case expedited treatment. On June 11, 1984 the Chairman granted the request in part, setting July 10, 1984 as the date for the response by Burlington Northern, Inc., and July 13 as the date by which oral arguments could be requested. The Burlington Northern Response was filed on July 5, 1984. At the request of Amtrak, oral proceedings were held on September 10, 1984. On September 7, 1984 Amtrak filed a Reply to the Burlington Northern Response. The Chairman, acting pursuant to Section 5 of the Rules, ordered at the hearing that the Reply would be received, but accorded Burlington Northern a right to a further Reply by October 15, 1984. That reply was filed on October 15, 1984.

* * * * *

The basic facts are simple, and not in dispute. Since 1976, Burlington Northern ("BN") has, from time to time, operated special excursions or charter Amtrak trains over its rail lines. On October 20, 1983, however, BN advised Amtrak that it had concluded that it was not obligated under the Basic Agreement to operate such trains, and would not do so in the future until an agreement was reached on compensation and indemnity to BN for operating such trains. Amtrak's responsive proposal for negotiations was unacceptable to BN. As a result, no special trains have been operated by BN since October 1983, except those that were the subject of correspondence prior to that date.

The issue, then, is whether the Basic Agreement obligates BN to operate special trains as Amtrak may request, provided they do not cause unreasonable interference with the adequacy, safety and efficiency of BN's other operations. The answer must be in the affirmative.*/

Section 3.1 of the Agreement requires BN to provide services requested by Amtrak "in connection with the operation of NRPC's Intercity Rail Passenger Service," which is defined in Article I as "all rail passenger service over the lines of Railroad." The inclusiveness of the word "all" is emphasized by the fact that the parties to the Agreement

*/ An objection by BN to the jurisdiction of the Panel was withdrawn at the September 10, 1984 hearing.

specified two exceptions -- commuter service and certain auto ferry service. "Intercity Rail Passenger Trains" are also defined as "all trains operated in Intercity Rail Passenger Service." The Agreement also reflects, in Section 2.1, an understanding that not all rail passenger service is regularly scheduled, by forbidding BN to operate only "regularly scheduled" rail passenger service. Amtrak agrees that Section 2.1 permits BN, as well as Amtrak, to operate special trains.*

The appendices to the Basic Agreement are even more specific. Appendix IV, in Section B-1-b, provides that the monthly payment to BN for costs of maintenance of way, computed on gross ton miles, shall include, in addition to regular trains, "extra trains." Appendix V, in Section A-5, excludes from calculation of the incentive payment to BN, "A special train, an extra train over the same route or a section of a scheduled train which is requested by NRPC." The argument of BN that "A special train" in that sentence is to be read as defining or describing the two following categories -- as if it were followed by a colon, or i.e. -- is a distortion of its plain reading.

*/ The memorandum prepared by the railroad negotiators on the course of negotiations dated July 31, 1971, states (p. 34) that the words "regularly scheduled" were included at the request of the railroads "to permit a railroad to operate an excursion or special train without the prior consent of NRPC."

BN urges, however, that notwithstanding those several provisions, its obligation is measured by Section 3.1 of the Basic Agreement, which provides that "The routes, schedules and consists of NRPC Intercity Rail Passenger Trains operated by Railroad shall be as set forth in Appendix I." That appendix, in great detail, sets out routes, schedules and consists of scheduled trains, but has no reference to special trains, nor has Amtrak requested any revisions of Appendix I, as it is empowered to do.

When the Agreement and its appendices are read as a whole, however, it is apparent that Appendix I does not represent BN's total obligation. BN does not challenge its obligation to operate detour moves, second sections or extra trains over the same route. Indeed, it has not regarded Appendix I as meaningful; almost none of Amtrak's passenger trains over BN tracks now correspond to the routes, schedules and consists there set out, although the amendment procedure under which Amtrak can request modified or additional service, as set out in Section 3.2, has not been used.

BN also argues that both parties have recognized that special trains are not covered by the Basic Agreement. It is unnecessary to decide whether the Panel is authorized to thus ignore Agreement language -- see Minmar Builders, Inc. v. Beltway Excavators, Inc., 246 A.2d 784 (D.C. App., 1968); Burbridge v. Howard University, 305 A.2d 245 (D.C. App., 1973) -- since it is by no means clear that BN's assertion is correct.

It is undisputed that when Amtrak proposed a special train to BN, as it has done a number of times in the past, it did so by way of an Authorization Notice (AN). This, BN contends, demonstrates that special trains are not covered by the Basic Agreement, since, it contends, ANs, at least in the early years of the Basic Agreement, were used only for services it was not required to perform. While it is clear that ANs were issued by Amtrak to BN for services which BN had no Agreement obligations to provide, it is by no means equally clear that even in the early years they were used only for such services. It seems more likely that, as Amtrak contends, they were used both for work or services not covered at all, and for work or services which required Amtrak's specific authorization or agreement as to the amount to be paid because that amount was not specified in the Basic Agreement. That appears to be the meaning of the language used in the Amtrak memorandum stating when ANs were to be used -- "in authorizing work not covered by the Operating Agreements." The significance of the ANs as to the understanding of the parties is also tempered by the fact that for some ten years BN did not object to special trains, although it asserts it did so only as a favor to Amtrak, and that in calculating compensation due it for providing for special trains it accepted the maintenance of way compensation set out in Appendix B-1-b of the Basic Agreement for, inter alia, "extra trains."

BN also cites Section 562(g) of Title 45, which directed Amtrak to contract on an industry-wide basis to establish rights for the operation of special trains between specific points anywhere in the United States. The explanation in the conference report on the section (H.R. 96-481, 96th Cong., 1st Sess., p. 30 (1979)) states that Amtrak has had difficulty with respect to charter business "because of the difficulty in making run-through arrangements with the numerous rail carriers between points of origin and destination whenever those points were between long distances." Amtrak denies the BN assertion that it sought the legislation, and in any event it did not pursue such an industry-wide agreement and urged in 1983 that it be repealed.

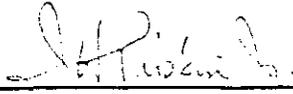
Whoever it was who proposed Section 562(g), neither its language nor the explanation for it quoted above suggests that it was intended to affect whatever arrangements for special trains might exist with individual railroads. The statement in Amtrak's Legislative Report of February 15, 1983 to the Congress recommending repeal, stating that "the current arrangements of contracting for charter and special train movements on an ad hoc basis has been satisfactory," describes with reasonable accuracy the AN process employed by Amtrak.

Two other BN arguments remain to be noted. That the Basic Agreement and its appendices nowhere refer to "charter" or "excursion" trains is not significant; "special" or "extra" trains are generic terms fully adequate to describe

trains of that sort. And that Amtrak was created to relieve the railroads of their statutory responsibility for intercity rail passenger service -- which did not include an obligation to operate special trains, although they did in fact operate them -- does not suggest, much less compel, the conclusion that Amtrak would not wish to operate as the railroads had done and contract accordingly. However, as noted above, the Basic Agreement does recognize a distinction between regularly scheduled rail passenger service, for which Amtrak has exclusive rights, and other service, such as special trains, which may be operated by both Amtrak and BN.

The award requested by Amtrak is granted. The Panel finds that BN is required to provide special passenger train service to Amtrak pursuant to the BN Basic Agreement and in accord with the compensation structure contained in that Agreement, and BN is directed to perform such service.





Dated: October 19, 1984

C. George Niebank, Jr. dissents.

CERTIFICATE OF SERVICE

I certify that on March 25, 2015 a true copy of the foregoing National Railroad Passenger Corporation's Petition to Intervene in the matter of Great Canadian Raitour Company Limited d/b/a Rocky Mountaineer- Petition for Exemption (STB Docket No. FD 35851) was served via e-mail upon the following counsel of record:

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