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VIA E-FILING

December 10, 2014

237199

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
December 10, 2014
Part of
Public Record

Re: STB Finance Docket No. 35743, Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the National Railroad Passenger Corporation's Reply to the Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests.

If you have any questions, please contact me.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda J. Morgan".

Linda J. Morgan
Attorney for National Railroad Passenger Corporation

Enclosure

**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**

**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY TO THIRD
MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY AND GRAND TRUNK
WESTERN RAILROAD COMPANY TO COMPEL RESPONSES TO DISCOVERY
REQUESTS**

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December 10, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35743

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WESTERN RAILROAD COMPANY TO COMPEL RESPONSES TO DISCOVERY
REQUESTS**

The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby replies to the Third Motion of Illinois Central Railroad Company and the Grand Trunk Western Railroad Company (together and hereinafter referred to as “CN”) to Compel Responses to Discovery Requests (hereinafter “Third Motion to Compel”). By its Third Motion to Compel, CN requests the Board to direct Amtrak to produce extensive ridership and revenue data beyond what Amtrak has already produced. Amtrak has already provided CN with significant relevant ridership and revenue data, and has objected on the grounds of breadth and relevance to producing anything more. Nevertheless, despite its objection to CN’s request, in the interest of moving the case forward, Amtrak is willing to produce substantially all of the additional information CN has requested in its Third Motion to Compel, which is narrowed from earlier requests to which Amtrak objected.¹

¹ This is the third Motion to Compel filed by CN in this proceeding. The Board granted in part and denied in part CN’s first Motion to Compel. *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(a) – Canadian National Railway Company*, STB Docket No. FD

BACKGROUND

On December 2, 2014, CN filed a Motion to Compel production of “ridership and revenue database information pertaining to services Amtrak operations on CN’s lines,” which CN has referred to as “Relevant Services.” Third Motion to Compel, 1. CN’s original request for this type of information was set forth in Request for Production (RFP) Nos. 16 and 17. Third Motion to Compel, 4-5. These requests sought the following:

RFP No. 16

Please produce all documents relating to the number of passengers loading and unloading on particular trains at each station on the Relevant Services, any analyses or projections of the number of passengers on particular trains of the Relevant Services and between particular segments of the Relevant Services and any analyses of ridership trends or factors affecting ridership on the relevant services.

RFP No. 17

Please produce all documents relating to passenger ticket revenue generated by Amtrak on 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.

(emphasis added).

Amtrak objected to both RFP No. 16 and RFP No. 17. In its answer, Amtrak objected to RFP No. 16 on the basis that it was compound and sought documents that were not relevant and not likely to lead to the discovery of admissible evidence in this proceeding. Amtrak objected to RFP No. 17 because it was overbroad, and like RFP No. 16, sought documents neither relevant nor calculated to lead to the discovery of admissible evidence. In addition, Amtrak objected to the requests because both sought documents that contain highly proprietary and commercially

35743, slip op. at 6 (STB Served April 15, 2014) (hereinafter “April 15 Decision”). CN appealed the Board’s April 15 Decision and filed a Second Motion to Compel. The Board granted in part the appeal and granted in part and denied in part CN’s Second Motion to Compel. *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian National Railway Company*, FD 35743 (STB served Sept. 23, 2014) (“September 23 Decision”).

sensitive information. However, in its response Amtrak agreed to provide responsive, non-privileged documents relating to these requests.

In the discovery discussions between Amtrak and CN regarding a number of issues, CN continued to ask for the full scope of what it sought in RFP Nos. 16 and 17. In pursuing its request, CN also argued that it was entitled under the Joint Discovery Protocol (set forth in Exhibit 2 to the Third Motion to Compel) to revenue and ridership data housed in the Enterprise Data Warehouse (hereinafter referred to as the “Enterprise Database”) and information concerning that database to support the documents being sought. Amtrak continued to object to CN’s request for production as overbroad and beyond any reasonable determination of relevance. Nevertheless, after continued discussions, Amtrak, in an effort to compromise, agreed on September 22, 2014, to provide CN with ridership and revenue data in the form of monthly reports and annual reports for the period May 1, 2011 to October 31, 2013, in accordance with the discovery period agreed upon pursuant to the Joint Discovery Protocol. These reports are generated from the Enterprise Database where the ridership and revenue data is maintained. CN responded by asking for more ridership and revenue data from the database.

In subsequent exchanges with CN, Amtrak provided, at CN’s request, the description of the tables and fields from the Enterprise Database. In response to that production, CN wrote to Amtrak that “[b]ased on our review of the document you provided below describing Amtrak’s database table and fields . . . we ask that Amtrak produce the entirety of the database within our agreed upon data range (May 1, 2011 to October 31, 2013).” Third Motion to Compel, Exhibit 15, page 3 (emphasis added). Amtrak objected at that point to any further production of ridership and revenue data.

In a subsequent meet and confer discussion on October 22, 2014, CN narrowed the scope of its earlier request for this data to just the ridership and revenue database information on CN lines. Upon review of CN's most recent request and in light of the amount of data already produced by Amtrak in response to CN's discovery requests for ridership and revenue data, Amtrak determined that ridership and revenue data already provided to CN legally satisfied CN's requests based on RFP Nos. 16 and 17 and Amtrak's original response to those requests.

As the Board knows, the discovery process in cases such as this one, where there is a large amount of data sought by both sides, can be time-consuming and resource-intensive. Amtrak has continued to engage in discovery negotiations with CN in good faith throughout this proceeding. In fact, Amtrak and CN have been in weekly contact to confer over discovery matters since the Board issued its September 23, 2014 decision regarding other discovery issues. On a whole host of discovery issues, Amtrak and CN have reached agreement on the production in question and executed the process without Board involvement. In this instance, CN's original RFPs and follow-up requests for ridership and revenue data have exceeded the bounds of what is relevant and Amtrak has rightfully objected to producing anything beyond what it has already produced.

DISCUSSION

Parties to proceedings before the Board are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. §1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." *Waterloo Ry.—Adverse Aban.—Lines of Bangor & Arroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 124 (Sub-No. 2) *et al.*, slip

op. at 2 (STB served Nov. 14, 2003). The burden to show relevance is on the moving party. Mere speculation that something might be relevant is inadequate to meet that burden.

Whether a particular motion to compel should be granted is a factual determination by the Board. *Rio Grande Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Company – Control – Southern Pacific Transportation Company*, FD 32000, slip op. at 9 (ICC served May 6, 1988) (“Decisions as to the scope of discovery or the admissibility of evidence will be made on the merits of individual requests.”). In making such a determination, the Board has found that an expansive request “will be denied because it is unduly broad and burdensome.” *Waterloo Ry.*, slip op. at 3. “The Board’s Rules generally provide for liberal discovery of non-privileged matter that is reasonably calculated to lead to discovery of admissible evidence.” *Duke Energy Corporation v. Norfolk Southern Ry. Co., NOR 42069, et al.*, slip op. at 4 (STB served July 26, 2002) (citing 49 C.F.R. 1114.2(a)). “However, discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Id.* Therefore, relevance is not without boundaries, and when requests are made for documents beyond what is considered reasonable, the Board will act accordingly to limit discovery and deny a motion to compel.

To date, Amtrak has provided CN with a significant amount of data from the ridership and revenue database in the form of the monthly reports and annual reports for the agreed upon timeframe. The data provided contains proprietary information. It details the number of riders on Amtrak’s routes as well as the revenues for that period. CN is asking for more than this data. It originally argued that it needed this data in order to assess Amtrak’s performance incentives and penalties proposal, to which Amtrak responded that, in connection with its Opening Submission, it would be providing work papers that would respond more directly to this issue—

an argument that CN itself made in objecting to Requests for Production from Amtrak. CN Third Motion to Compel, 14. Then, more recently, at a November 19 meet and confer discussion, CN made an additional argument that it also needs more segment and train specific data for CN lines than is available in the monthly and annual reports in order to prepare its Opening Submission. Third Motion to Compel, 13-14.

In particular, CN argues that the data produced by Amtrak excludes “ridership and revenues ‘at each station,’ ‘on each segment,’ and ‘between particular segments.’” CN also seeks “data specific to individual trains” and “data specific to the services run on CN’s lines as a part of Amtrak services that run over multiple host railroads.” CN argues that without this data it cannot “analyz[e] in terms of ridership or revenues the relative importance and value of” various on-time performance measurements. Third Motion to Compel, 11. The data Amtrak has produced, however, provides the basis from which specific analysis can be derived for the preparation of CN’s Opening Submission, and it is not clear why what CN says it needs cannot be derived from the significant number of monthly and annual reports already provided.

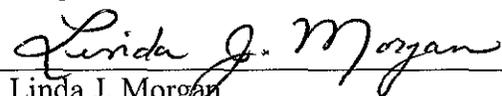
CONCLUSION

CN’s request for additional data goes beyond the reasonable boundaries of what is relevant for the preparation of CN’s case, and Amtrak has accordingly objected to providing this additional data. Nevertheless, despite its objections, in the interest of moving the case forward, Amtrak is willing to produce substantially all of the additional information CN has requested as narrowed by the language of the Third Motion to Compel. Specifically, Amtrak will provide, in native format, the ridership and revenue fields of its database identified by Amtrak in Exhibit 3 of the Third Motion to Compel for the services it runs (in whole or in part) on CN lines within the agreed-upon discovery range (May 1, 2011, to October 31, 2013), excluding any individual

ticket pricing data, which Amtrak has objected to producing from the beginning and for which CN has provided an insufficient basis for needing. Amtrak is prepared to provide this data no later than December 23, 2014.

Dated: December 10, 2014

Respectfully submitted,



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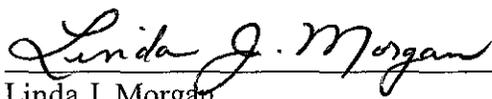
Counsel for National Railroad Passenger Corporation

CERTIFICATE OF SERVICE

I certify that on December 10, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply to the Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests was served via email upon the following counsel of record:

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