



NOSSAMAN LLP

ATTORNEYS AT LAW

1666 K Street, NW  
Suite 500  
Washington, DC 20006  
T 202.887.1400  
F 202.466.3215

Linda J. Morgan  
D 202.887.1429  
lmorgan@nossaman.com

VIA E-FILING

May 9, 2013

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

236027  
ENTERED  
Office of Proceedings  
May 9, 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 – National Railroad Passenger Corporation’s Reply In Opposition to Second Motion to Compel Responses to Requests for Production by the Illinois Central Railroad Company and Grand Trunk Western Railroad Company**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the National Railroad Passenger Corporation’s Reply In Opposition to the Second Motion to Compel Responses to Requests for Production by the Illinois Central Railroad Company and Grand Truck Western Railroad Company.

If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan  
*Attorney for National Railroad Passenger Corporation*

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 35743**

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

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**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN  
OPPOSITION TO SECOND MOTION TO COMPEL RESPONSES TO REQUESTS FOR  
PRODUCTION BY THE ILLINOIS CENTRAL RAILROAD COMPANY AND GRAND  
TRUNK WESTERN RAILROAD COMPANY**

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Linda J. Morgan  
Kevin M. Sheys  
Paul L. Knight  
Nossaman LLP  
1666 K Street, NW, Suite 500  
Washington, DC 20006  
(202) 887-1400

William H. Herrmann  
Managing Deputy General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, NE  
Washington, DC 20002  
(202) 906-3971

*Counsel for National Railroad Passenger Corporation*

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**BEFORE THE  
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TRUNK WESTERN RAILROAD COMPANY**

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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, respectfully opposes the second motion to compel responses to Requests for Production of Documents Nos. 8-10 and 14, and Interrogatories 17 and 20 (“Second Motion to Compel”) by the Illinois Central Railroad Company (“IC”) and the Grand Trunk Western Railroad Company (“GTW”) (together and hereinafter referred to as “CN”).<sup>1</sup>

**INTRODUCTION**

On May 2, 2014, CN moved to compel Amtrak to produce the documents requested in CN’s Requests for Production of Documents Nos. 8-10 and 14, and to supplement our answers to

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<sup>1</sup> This is the second 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 Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company*, STB Docket No. FD 35743, slip op. at 6 (STB Served April 15, 2014) (hereinafter “April 15 Decision”). CN filed an appeal of this decision on May 5, 2014. *Appeal of Illinois Central Railroad Company and Grand Trunk Western Railroad Company From Partial Denial of Motion to Compel Responses to Request for Production of Documents*, May 5, 2014.

CN's Interrogatories 17 and 20. Second Motion to Compel, 1. These discovery requests by CN seek:

1. All documents and information regarding actual and potential capital expenditures and contributions by Amtrak for infrastructure on Host Railroad lines owned by CN and all other hosts, and all documents relating to Amtrak's funding and funding priorities insofar as relevant thereto (RFP Nos. 8-10, Interrogatory 20).
2. All documents and information regarding Amtrak's promulgation and implementation of measurements, classifications, and coding of delays to Amtrak trains on Class I Host Railroad Lines and all complaints and issues raised concerning all delays on all Amtrak trains (RFP No. 14, Interrogatory 17).

CN's Second Motion to Compel far exceeds what is relevant to this proceeding. In support of its Second Motion to Compel, CN would have the Board believe that Amtrak is producing minimal documents of little value. To the contrary, Amtrak is already in the process of providing hundreds of thousands of documents that relate to the requests CN has made. With respect to this Second Motion to Compel, Amtrak has agreed to produce all documents pertaining to CN, including both actual and potential capital expenditures relating to CN (pursuant to Amtrak's revised search terms appended to CN's motion). Even with all the documents Amtrak has agreed to produce, CN still contends that it will be unable to present its case without a massive number of additional documents that do not relate to CN. While, in response to this Second Motion to Compel, Amtrak is willing to provide CN with documents regarding the actual capital investments on other Host Railroads, the rest of CN's requests are overly broad and unreasonably burdensome, and have at best a tenuous connection to the issues in this proceeding.

The Board should deny CN's motion to compel. Granting this Second Motion to Compel would establish a troublesome discovery precedent that would open the door to a standard of

relevance that would have no bounds and an outcome that would direct in the future the production of a vast amount of documents that have marginal, if any, relevance, without regard to burden or proportionality. In the ever expanding world of e-discovery, this is not an outcome that should be taken lightly.

## ARGUMENT

CN's Second Motion to Compel asks the Board to provide a substantial number of documents beyond what Amtrak has already agreed to provide because, CN argues, they may have some relevance. CN further argues that what it is seeking could be "potentially highly significant." Second Motion to Compel, 6. Of course, one can argue that every document in the possession of Amtrak is "potentially highly significant," but under that standard, there would be no limit placed on what could be discoverable. If the Board adopts CN's expansive standard of relevance, arguably all documents in possession of Amtrak would be relevant to this case. This cannot be a reasonable result. Accordingly, Amtrak asks the Board to deny CN's motion to compel.

### **I. In Addressing Motions to Compel, the Board Has Not Adopted a Standard of Relevance that is Limitless.**

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 & Arrostook 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*, Finance Docket 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.*, STB Docket No. 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.

As a basis for arguing relevance in support of its Second Motion to Compel, CN asserts that the Board “rejected Amtrak’s argument that its relationships with other Host Railroads are irrelevant” in its decision on CN’s first Motion to Compel. Second Motion to Compel, 9. This statement takes liberties with the Board’s decision on the first Motion to Compel, significantly oversimplifying its holding and inappropriately broadening its reach.

In that decision, the Board stated that the operating agreements which included “terms and conditions of Amtrak’s use of Host Railroad facilities and services” were relevant to the underlying proceeding. April 15 Decision at 6. “[O]perating agreements voluntarily reached in the marketplace, which reflect the terms and conditions of Amtrak’s use of Host Railroad

facilities and services, may provide information that would be useful to the Board prescription of new terms and conditions in the present case. These operating agreements are probative sources of evidence, which are relevant to the underlying proceeding.” *Id.*

The Board did not state that any and all aspects of Amtrak’s commercial dealings with every other Host Railroad are relevant and discoverable. The Board’s decision does not stand for the proposition that non-CN related documents related to capital expenditures, Amtrak funding priorities, delay coding information and service complaints are fair game for discovery. The Board’s decision focused on the relevance of operating agreements. Its holding is clearly narrower in scope than CN suggests and should not be the basis for granting the Second Motion to Compel.

**II. CN’s Requests for All Non-CN Documents Relating to Capital Expenditures and Infrastructure Funding Should Be Denied Because They Are Overbroad and Unreasonably Burdensome.**

As CN explains in its Second Motion to Compel at page 7, its discovery requests contained in RFP Nos. 8-10, and Interrogatory 20 seek all documents about capital expenditures and funding sources for infrastructure investments which “Amtrak has considered, made, agreed to, rejected, or been asked to make for host rail lines over which it operates” as well as information about “funds available for such expenditures, Amtrak’s efforts to obtain such funding, and Amtrak’s communications with Government officials” about funding priorities relating to operations on host rail lines.<sup>2</sup> In essence, in addition to all the CN-related documents that Amtrak has agreed to produce, CN seeks all documents related to capital expenditures and

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<sup>2</sup> In its motion to compel, CN states that it is not seeking information relating to expenditures or funding for the Northeast Corridor or other rail lines owned or controlled by Amtrak. Second Motion to Compel, 7. This CN concession will still not alleviate the massive burden that would be placed on Amtrak to search its files for records relating to other Host Railroads.

funding related to all other Host Railroads. These requests are overbroad and unreasonably burdensome and should be denied.

To illustrate the expansiveness of the specific requests, it is instructive to highlight some of the actual text of the RFPs. In particular, CN asks for the following:

RFP No. 8: [A]ll documents relating to any consideration of, or communications regarding, actual or potential capital expenditures (whether by Amtrak or by the Host Railroad or by other entities or jointly) or contributions to capital expenditures to improve, facilitate, or reduce costs associated with Amtrak service on any Host Railroad's tracks . . .

RFP No. 9: [A]ll documents . . . relating to monies earmarked or otherwise available to Amtrak to fund, contribute to, or compensate a Host Railroad for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad.

RFP No. 10: [A]ll documents . . . relating to Amtrak efforts to obtain funds from public or private sources for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad.

Second Motion to Compel, Appendix at 1-2.

In response to RFP No. 8 Amtrak has agreed to produce all such documents that pertain to CN for the time period from 2008 forward. Specifically, in Search 5 of Amtrak's search terms, attached to CN's Second Motion to Compel as Exhibit 6, Amtrak, contrary to CN's claim, is providing all documents relating to actual or potential expenditures pertaining to CN. Additionally, in response to RFP No. 8, and in the spirit of working with CN towards a resolution of this matter, Amtrak is willing to provide CN with documents about capital expenditures Amtrak has actually made for other host rail lines over which it operates.

In response to RFP No. 9, Amtrak agreed to provide documents related to any funds allocated to Amtrak for the specific purpose of compensating CN for capital expenditures or capacity or infrastructure improvements on CN's rail lines from 2008 forward. Amtrak's

production in response to these three RFPs will provide CN with information that is directly relevant to this proceeding. In response to RFP No. 10, Amtrak agreed to provide documents related to Amtrak efforts to obtain funds for capital expenditures or capacity or infrastructure improvements on CN's rail lines for the time period from 2008 forward.

Keeping in mind the scope of the information that Amtrak has agreed to provide to date, the rest of CN's requests have at best a tenuous connection to the case. The remainder of the requests for information on capital expenditures contained in RFP No. 8 are excessive, overly broad and unreasonably burdensome. For example, documents relating to potential capital expenditures would involve every single communication about every single thought concerning any possible expenditure. This portion of RFP No. 8 alone would yield an enormous amount of documentation, much of it entirely irrelevant to this proceeding, particularly because of its speculative nature. This request, like the others addressed in the Second Motion to Compel, is not sufficiently narrow to warrant granting the Motion.

Turning to RFP No. 9, information on "all monies earmarked or otherwise available . . . to contribute or compensate a Host Railroad," would encompass a broad array of documents that go beyond the scope of this proceeding, which deals with the operating agreement between Amtrak and CN. RFP No. 10 is similarly overbroad.

CN claims that it is interested in documents that reflect Amtrak's thought process regarding capital investments. Documents pertaining to CN will do just that. Additional documents pertaining to other railroads, particularly those relating to potential expenditures, have no connection to the terms and compensation of the operating agreement between Amtrak and CN, which is what is before the Board..

The language of Interrogatory 20 is likewise overbroad. Interrogatory 20 asks Amtrak to:

[I]dentify and describe with particularity all documents relating to communications between Amtrak (including its employees, representatives or agents) and Government agencies, Members of Congress, congressional committees, state governors, and their staffs regarding the Relevant Services or Amtrak's funding, funding needs or funding priorities.

Second Motion to Compel, Appendix at 2. In response, Amtrak has agreed to produce documents related to CN.<sup>3</sup>

Interrogatory 20 is particularly unreasonable and overbroad as it seeks "all documents relating to communications between Amtrak and members of Congress and other governmental officials concerning CN or Amtrak funding" relating to any and all Host Railroads. CN does not need information relating to all Amtrak funding issues related to all Host Railroads in order to determine the terms and compensation for the operating agreement between Amtrak and CN. The amount of material this request would yield and the effort to collect it is out of proportion with the amount of information required for CN to argue its case or for the Board to make a decision in this proceeding. Specifically, CN would have Amtrak, which constantly interacts with Federal and state Government agencies in connection with its funding requirements, locate, review and produce all documents relating to any communication about funding for all Host Railroads. Production of this vast number of documents cannot be what is required. Requesting all documents relating to communications between Amtrak and the Government concerning funding goes far beyond what is relevant to the issues CN is raising.

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<sup>3</sup> CN has offered to limit its request to exclude documents relating specifically to the Northeast Corridor. Second Motion to Compel, Exhibit 1. As noted in footnote 1, *supra*, this limited concession will not alleviate the massive burden that would be placed on Amtrak to search its files for records relating to other Host Railroads.

**III. CN's Requests for All Non-CN Delay-Related Documents Are Also Overbroad and Unreasonably Burdensome and Should Be Denied.**

Likewise, CN's requests and complaints pertaining to delay are overboard. In particular, CN requests all communications relating to coding of delays of Amtrak trains on Class I Host Railroad lines and all complaints and related documents concerning delay on all Amtrak trains. In one way or another, these documents touch the totality of Amtrak's operations and would be massive in number. More specifically, RFP No. 14 requests:

[A]ll documents . . . relating to communications between and among Amtrak employees, or between and among Amtrak employees and former employees, relating to the classification or coding of delays to Amtrak trains for [Class I Railroads] or for purposes of any Operating Agreements.

Interrogatory 17 seeks:

[A]ll documents related to complaints or grievances, Ombudsman files, whistleblower disclosures, reports, and any other documents including criticism or an assessment regarding (a) Amtrak's operation of the Relevant Services, or (b) Amtrak's promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains.<sup>4</sup>

Second Motion to Compel, Appendix at 3.

Regarding RFP No. 14, it is important to note that CN already has access to Amtrak's On-Time Performance Monitoring System, which it has had since 2010. This system is a near real-time historical database of reported train movement and train delay information for all Amtrak trains operating on all Host Railroad lines. CN can query this information as needed. In addition, Amtrak has agreed to provide other documents related to CN lines. In response to

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<sup>4</sup> The parties agreed to revise the date range for these requests and others to address documents dated May 1, 2011 to October 31, 2013, and CN revised the request in RFP No. 14 to include only documents relating to Amtrak's operating agreements with Class I Host Railroads. Second Motion to Compel, 10. While CN offers guidance as to the type of documents it is particularly interested in, this is just guidance and in any event would not minimize the burden of production. *Id.* at 13-14.

Interrogatory 17, Amtrak agreed to provide documents pertaining to that interrogatory's part (a) and also to part (b) by producing responsive CN documents. Second Motion to Compel, Appendix at 3.

With respect to RFP No. 14, Amtrak has agreed to produce and is providing any and all responsive information for CN lines, but not related to Host Railroads. The methods Amtrak employs to deal with delay coding as it relates to CN would clearly provide relevant information pertinent to the operating agreement between CN and Amtrak. However, the remainder of this request is overbroad and unreasonably burdensome. Production to include all Class I Host Railroad delay documents would be massive. In arguing the importance of the documents requested in RFP No. 14 for all Class I Host Railroads, CN speculates that without the documents it would be inhibited from understanding "issues that may not have directly affected CN to date but may affect CN in the future." Second Motion to Compel, 13. This request for documents related to issues which may affect CN in the future is speculative and overbroad.

Regarding Interrogatory 17(b), CN is requesting all stated documents for all Amtrak trains, not just CN, so any complaint regarding any Amtrak train would be discoverable. This is another expansive request that takes relevance to an unreasonable extreme. The production of documents that do not implicate CN is unquestionably overbroad and unduly burdensome. Just to provide some perspective on this request, Amtrak runs approximately 280 one-way trips per day on over twenty-five Host Railroads. All documents relating to those trains would be discoverable under CN's Motion to Compel. It would require the production of a significant amount of material that is not relevant to issues relating to the terms and compensation of the future operating agreement between Amtrak and CN, which is what is before the Board.

## CONCLUSION

CN's requests lack relevance, are extremely broad and unreasonably burdensome. They call for the production of documents that cover every aspect of Amtrak operations, not just those related to CN. CN's requests would result in the production of massive numbers of documents that have no specific relevance to this proceeding. Amtrak urges the Board to deny CN's Second Motion to Compel.<sup>5</sup>

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<sup>5</sup> Federal courts, which have been increasingly dealing with e-discovery issues, have become concerned with the enormous costs of e-discovery. They have increasingly relied on the rule of proportionality – that the production of documents be proportional to the value and needs of the case. *See, e.g.*, Rule 26(b)(2) of the Federal Rules of Civil Procedure and particularly the commentary to the proposed amendments to Rule 26 by the Duke Conference Subcommittee and the Discovery Subcommittee of the Advisory Committee on Civil Rules. Committee on Rules of Practice and Procedure of the Judicial conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure – Request for Comments (2013), <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>, at 264-70. CN's requests are overbroad and unreasonably burdensome, and clearly implicate the concept of proportionality.

Dated: May 9, 2014

Respectfully submitted,

/s/Linda J. Morgan

Linda J. Morgan  
Kevin M. Sheys  
Paul L. Knight  
Nossaman LLP  
1666 K Street, NW, Suite 500  
Washington, DC 20006  
(202) 887-1400

/s/William H. Herrmann

William H. Herrmann  
Managing Deputy General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, NE  
Washington, DC 20002

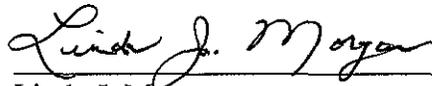
*Counsel for National Railroad Passenger Corporation*

**CERTIFICATE OF SERVICE**

I certify that on May 9, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to the Second Motion to Compel Responses to Requests for Production of Documents was served via email upon the following counsel of record:

David A. Hirsh  
HARKINS CUNNINGHAM LLP  
1700 K Street, N.W., Suite 400  
Washington, D.C. 20006-3804

Theodore K. Kalick  
CN  
Suite 500 North Building  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-3608

  
\_\_\_\_\_  
Linda J. Morgan