

SERVICE DATE – DECEMBER 11, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

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

Digest:<sup>1</sup> In this decision, the Board grants a motion by Illinois Central Railroad Company and Grand Trunk Western Railroad Company to remove the confidentiality designation from specific portions of Amtrak's opening statement.

Decided: December 9, 2015

After the National Railroad Passenger Corporation (Amtrak) filed an application under 49 U.S.C. § 24308(a)(2), the Board instituted a proceeding to establish reasonable terms and compensation for Amtrak's use of the facilities and services of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, CN).<sup>2</sup> Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 3 (STB served Aug. 9, 2013). On December 16, 2013, the Board granted the parties' joint motion for protective order.<sup>3</sup>

The parties filed their opening submissions on September 4, 2015. On October 28, 2015, CN filed a motion to remove the confidentiality designation from portions of Amtrak's opening submission, arguing that Amtrak has not shown that it is necessary to keep much of the redacted information confidential. CN's motion identifies the redactions in Amtrak's opening statement to which CN does not object and the redacted material it believes should be made public. On October 29, 2015, Amtrak filed a revised public version of its opening statement, removing the confidentiality designation from a number of sections it had originally designated as confidential, but retaining redactions of other information. On November 17, 2015, Amtrak replied to CN's motion, arguing that the redacted material over which there is still controversy is confidential

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

<sup>2</sup> Illinois Central Railroad Company and Grand Trunk Western Railroad Company are indirect subsidiaries of Canadian National Railway Company.

<sup>3</sup> The protective order was amended on November 5, 2015, pursuant to a joint motion from the parties.

financial information.<sup>4</sup> On November 20, 2015, CN filed a motion for leave to file a response to Amtrak's reply and its response to Amtrak's reply.<sup>5</sup>

Based on Amtrak's revised public opening statement and CN's response, the redaction of the following information remains in controversy: (1) the percentage thresholds for penalties and performance payments under the current agreement between Amtrak and CN; (2) the maximum penalty payment in Amtrak's proposed terms; and (3) the maximum performance payment in Amtrak's proposed terms.

Amtrak argues that this information should remain confidential because the material is "financial information" expressly within the definition of Confidential information in the Protective Order." (Amtrak Reply 4-6.) CN counters that the percentage thresholds for penalties and performance payments in the current agreement between Amtrak and CN are already publicly available in National Railroad Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway, Docket No. NOR 42134. (CN Response to Amtrak Reply 2-3, Nov. 20, 2015; CN Answer 4, Jan. 8, 2015, Nat'l R.R. Passenger Corp., NOR 42134.) CN also argues that the maximum penalty payment and the maximum performance payment in Amtrak's proposed terms are "the very essence of its proposal," and that it is inappropriate to treat this information as confidential because this would prevent the public from fully understanding Amtrak's proposal. (CN Response to Amtrak Reply 3.) CN further argues that this information does not represent "any pre-existing confidential financial realities" and thus is not financial information. (CN Response to Amtrak Reply 4.)

## DISCUSSION AND CONCLUSIONS

Pursuant to paragraph 18 of the protective order in this proceeding, "[i]nformation that is publicly available, or obtained outside of these Proceedings from a person with a right to disclose it publicly, shall not be subject to this Protective Order . . . ." Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 10 (STB served Dec. 16, 2013). The percentage thresholds for penalties and performance payments under Amtrak's and CN's current agreement were publicly disclosed in National Railroad Passenger Corp., NOR 42134, as part of CN's January 8, 2015 reply in that proceeding. In addition, as CN notes, the current agreement contains no confidentiality provision. (CN Mot. 15.) That information is therefore properly treated as public in this proceeding, and we grant CN's motion to have that information designated as public in Amtrak's opening statement.

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<sup>4</sup> The confidential version of Amtrak's November 17, 2015 reply includes a copy of its opening statement identifying the redactions the parties agree on, marked in green, and the redactions over which the parties disagree, marked in red. The extent of the redactions in the November 17 version of the opening statement is significantly smaller than those contained in Amtrak's revised public version of its opening statement filed on October 29. For the purposes of adjudicating CN's motion we presume the November 17 version of Amtrak's opening statement contains the remaining redactions in dispute.

<sup>5</sup> CN's motion for leave to file its reply is granted and its response to Amtrak's reply is accepted into the record.

We also find that the maximum penalty payment and maximum performance payment in Amtrak's proposed terms (and the data underlying the calculation of those payments) should be part of the public record. In its reply to CN's motion, Amtrak removed the confidentiality designation from the elements and explanation of the formula by which it calculates the savings rate to CN of providing a certain level of service. (See Amtrak Reply, confidential version, V.S. Sacks 16-17.) By proposing to submit this information publicly and unredacted, Amtrak effectively agrees to make the formula public. Amtrak nonetheless maintains that the CN-specific inputs are confidential. These are (i) the specific, calculated values for CN's cost per train mile for providing a certain level of service (described as a "February 2013 Level of Service cost per train mile" and a "pre-February 2013 Level of Service cost per train mile"), and (ii) the actual host-responsible delay (HRD) figures on each route (expressed as minutes of HRD per 10,000 train miles, or HRD/10k), which go into the savings rate formula. (See Amtrak Reply, V.S. Sacks 16-17, 19, 22-23, D-1, E-1.) Amtrak's proposed maximum penalty and performance incentive payments then flow from these initial calculations. (Amtrak Reply, V.S. Sacks 20-23.)

The February 2013 Level of Service cost per train mile to CN is a number developed by CN. Similarly, the Pre-February 2013 Level of Service cost per train mile to CN and the difference between those two numbers are derived from CN's own estimate of its pre-February 2013 additional costs and its annual train miles. (See Amtrak Reply 14-15; Amtrak Reply, V.S. Vilter 13; Amtrak Reply, V.S. Sacks 16.) CN has stated that it does not wish for those figures to remain confidential. (CN Response to Amtrak Reply 1 n.1 (noting that CN disagrees with all of Amtrak's redactions highlighted in red).) Since CN has no objection to its own cost estimates and train-mile information being made public, there is no basis for keeping this information confidential. As to the actual HRD figures, Amtrak publicly releases each carrier's HRD numbers in monthly performance reports,<sup>6</sup> and the Federal Railroad Administration (FRA) provides HRD data by route and host railroad in its Quarterly Report on the Performance and Service Quality of Intercity Passenger Train Operations.<sup>7</sup> Because this information is already public, under paragraph 18 of the protective order, it also is properly treated as public in this proceeding.

It appears that, taken together, the information discussed above that we conclude should be public either directly comprises, or forms the basis for, all of the remaining disputed redactions, which are highlighted in red in Amtrak's November 17, 2015 confidential reply to CN's motion, including the opening statement and verified statements attached as exhibits to that reply. Therefore, that information will be redesignated as public. The information highlighted in green, which both parties agree Amtrak has appropriately redacted, will remain designated as confidential. We will require Amtrak to promptly file a new public version of its opening statement with redactions in compliance with this decision.

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<sup>6</sup> Amtrak makes recent monthly performance reports available on its website. Reports & Documents, Amtrak, <http://www.amtrak.com/reports-documents> (last visited Dec. 4, 2015).

<sup>7</sup> These quarterly reports are available on the FRA's website. Rail Service Metrics & Performance Reports, Fed. R.R. Admin., <https://www.fra.dot.gov/Page/P0532> (last visited Dec. 4, 2015).

It is ordered:

1. All of the redactions highlighted in red in Amtrak's November 17, 2015 confidential reply (including exhibits) are redesignated as public.
2. Amtrak is ordered to file full and complete redesignated versions of its opening statement in compliance with the instructions in this decision as soon as possible, but no later than one week after the date of service of this decision.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.