

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

Decided: April 15, 2014

This decision grants in part and denies in part the motion of Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Company (GTW) (collectively, Canadian National Railway Company (CN)) to compel the National Railroad Passenger Corporation (Amtrak) to produce certain documents. Amtrak will be required to produce operating agreements with other railroads that host regular Amtrak service, but will not be required to produce operating agreements with other passenger rail services that Amtrak itself hosts on lines it owns or controls.

BACKGROUND

On July 30, 2013, Amtrak filed an application under 49 U.S.C. § 24308(a)(2), seeking: (1) the institution of a proceeding and a procedural schedule to determine reasonable terms and compensation for Amtrak's use of CN facilities (including rail lines) and services, making those new terms and compensation retroactively effective as of August 12, 2013, and (2) an interim service order, effective August 12, 2013, requiring CN to continue to make available to Amtrak the facilities and services necessary for Amtrak to continue to operate on CN rail lines under the same terms and compensation of the current Amtrak-CN contract.<sup>1</sup> CN responded to Amtrak's application by letter on August 1, 2013, and by formal reply on August 19.

In a decision served on August 9, 2013, the Board instituted a proceeding to establish reasonable terms and compensation for Amtrak's use of CN's facilities and services. The Board also required CN to continue to provide facilities and services to Amtrak on an interim basis under the terms of the existing contract. On August 21, 2013, the Board adopted the procedural schedule proposed by Amtrak and CN.

On October 24, 2013, Amtrak and CN filed separate statements of disputed issues. Amtrak identifies four general areas of dispute, including compensation, penalties, geographic scope, and length of contract.<sup>2</sup> CN identifies the issues in dispute as compensation, modification

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<sup>1</sup> Amtrak Application 1, July 30, 2013.

<sup>2</sup> Amtrak Statement 2, Oct. 24, 2013.

of performance payments and penalties clauses, and the classification of a 1.2-mile connection over CN.<sup>3</sup>

On December 16, 2013, the Board granted the parties' joint motion for protective order. To facilitate the parties' discovery process, the Board approved 30-day extensions of the procedural schedule on December 19, 2013, and January 17, 2014, as requested by the parties. On February 20, 2014, the Board granted the parties' joint request for a further 90-day extension of the procedural schedule, making May 29, 2014, the due date for the parties' opening submissions.

On February 14, 2014, CN filed a motion to compel responses to certain requests for production of documents and requested expedited consideration.<sup>4</sup> CN states that it served its first set of discovery requests on October 31, 2013, and that Amtrak refused to produce documents in response to Request for Production Nos. 5 and 6, asserting objections as to relevance, burden, and confidentiality of third parties' sensitive commercial information.<sup>5</sup> CN's Request No. 5 seeks the production of "all of Amtrak's Operating Agreements, including amendments, attachments, exhibits, and schedules thereto, with Host Railroads in force at any time since 1971."<sup>6</sup> CN's Request No. 6 seeks the production of "all agreements, including any amendments, exhibits, attachments or schedules thereto, in force at any time since 2008, relating to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak."<sup>7</sup> Under the parties' Joint Discovery Protocol, these requests (and certain others) subsequently were limited to documents created, revised, sent, or in effect between May 1, 2011, and October 31, 2013.<sup>8</sup>

CN argues that Amtrak's operating agreements are the most likely source of probative and relevant evidence because they are voluntary agreements reached in the marketplace by similarly situated parties.<sup>9</sup> Moreover, CN maintains there are strong legal and policy reasons to consider these voluntary commercial agreements and that the Board has looked to them in the past.<sup>10</sup> CN argues that because of the scope of the issues Amtrak identifies as in dispute, "there

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<sup>3</sup> CN Statement 2, Oct. 24, 2013.

<sup>4</sup> CN Motion 1-2, Feb. 14, 2014. The February 14 motion corrected a submission filed on February 12.

<sup>5</sup> Id., Ex. 1 at 10.

<sup>6</sup> Id.

<sup>7</sup> Id. at 3.

<sup>8</sup> Id., Ex. 2 at 2.

<sup>9</sup> Id. at 8-9.

<sup>10</sup> CN Motion 10-11, Feb. 14, 2014 (citing Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry., 3 S.T.B. 157, 163 (1998); Nat'l Rail Passenger Corp. Application Under Section 402(a) of The Rail Passenger Serv. Act, FD 30426, slip op. at 12 (ICC served July 15, 1985); Minn. Transfer Ry. Ordered to Provide Servs., Tracks

will be few, if any, aspects of a host railroad-passenger rail carrier operating agreement” that will not be relevant to the present case.<sup>11</sup>

CN disputes Amtrak’s assertion that production of the operating agreements under Request No. 5 would be unduly burdensome and oppressive,<sup>12</sup> asserting that it would result in the production of fewer than 40 operating agreements.<sup>13</sup> CN argues that its request for production of Amtrak operating agreements with host railroads is narrow and likely to produce relevant documents,<sup>14</sup> and that these documents are distinct and easily identifiable as they are likely to be maintained in the ordinary course of business.<sup>15</sup>

CN also argues that Amtrak’s claim of third-party commercial sensitivity and confidentiality is not a proper basis for refusing production.<sup>16</sup> CN states that issues of confidentiality often arise in matters before the Board and the established method of resolving such issues is the full production of requested documents pursuant to an appropriate protective order.<sup>17</sup> CN argues that the Board’s December 16, 2013 protective order provides sufficient protection and detailed rules for handling “Confidential” and “Highly Confidential” materials.<sup>18</sup> CN argues further that Amtrak’s claim to third-party confidentiality is unsupported because the other parties to Amtrak’s agreements have not taken any steps to prevent disclosure to CN.<sup>19</sup> CN asks the Board to prohibit Amtrak from designating the requested operating agreements as “Highly Confidential.”<sup>20</sup>

On February 19, Amtrak filed a reply in opposition. Amtrak states that each operating agreement sought by CN contains commercially sensitive and proprietary information with specific provisions setting forth specific prices for access and associated conditions which reflect the interest of the parties to the agreement, and that Amtrak’s internal policies prohibit the

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& Facilities for The Operations of Trains of Nat’l R.R. Passenger Corp. & The Establishment of Just & Reasonable Compensation for Such Servs., Tracks & Facilities, 354 I.C.C. 552, 558 & n.7 (1978); Nat’l R.R. Passenger Corp., Use of Tracks & Facilities & Establishment of Just Compensation, 348 I.C.C. 926, 949 (1977)).

<sup>11</sup> Id. at 13.

<sup>12</sup> Id., Ex. 3 at 12.

<sup>13</sup> Id. at 15

<sup>14</sup> Id. at 14.

<sup>15</sup> Id.

<sup>16</sup> CN Motion 15, Feb. 14, 2014.

<sup>17</sup> Id. at 16.

<sup>18</sup> Id. at 16-17.

<sup>19</sup> Id. at 21.

<sup>20</sup> Id. at 17, 23.

disclosure of third-party proprietary information unless it has permission to do so.<sup>21</sup> Furthermore, Amtrak asserts that it must preserve its own propriety interests because it is preparing to enter a “new round of contract renegotiations with the Class I host railroads.”<sup>22</sup> Amtrak further argues that CN has not shown the relevance of the requested operating agreements, as the matter before the Board is a dispute between CN and Amtrak and not a between Amtrak and any other entity. What is relevant to deciding the dispute, Amtrak claims, is what is reasonable as between Amtrak and CN, not the marketplace in which Amtrak and any other host carriers operate.<sup>23</sup> Amtrak asserts that operating agreements where Amtrak is the host to other passenger service providers are irrelevant because those agreements have been negotiated pursuant to a different statutory requirement that does not limit compensation to incremental costs.<sup>24</sup> Moreover, Amtrak argues, because Section 212 of the Passenger Rail Investment and Improvement Act of 2008 obligates Amtrak and other affected parties to determine an appropriate cost methodology for operations on the Northeast Corridor going forward, operating agreements currently in place for passenger service have evolved under a different set of circumstances and are therefore not relevant to the current dispute.<sup>25</sup>

On February 19, 2014, Norfolk Southern Railway Company (NS) filed a petition for leave to intervene for the limited purpose of partially opposing CN’s motion to compel. NS states that two operating agreements currently in effect with Amtrak appear to be subject to CN’s requests for production.<sup>26</sup> NS contends that both agreements contain confidential and commercially sensitive information that would harm its interests if those agreements were released to the public or CN, and thus opposes CN’s request that the Board prohibit Amtrak from designating the agreements as “Highly Confidential.”<sup>27</sup> NS states, however, that it believes that its operating agreements with Amtrak are relevant to this proceeding and that it has no objection to the disclosure of those agreements subject to a “Highly Confidential” designation as provided for in the Board’s protective order.<sup>28</sup>

On February 21, 2014, CSX Transportation (CSXT) filed a petition to intervene in partial opposition to the motion to compel, stating that CN’s motion implicates private agreements between CSXT and Amtrak.<sup>29</sup> CSXT does not oppose production of its agreements with Amtrak, but argues that they should be designated as “Highly Confidential.”<sup>30</sup> Further, CSXT

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<sup>21</sup> Amtrak Reply 3-4, Feb. 19, 2014.

<sup>22</sup> Id. at 4.

<sup>23</sup> Id. at 5-6.

<sup>24</sup> Id. at 6.

<sup>25</sup> Id.

<sup>26</sup> NS Pet. 2-3, Feb. 19, 2014.

<sup>27</sup> Id. at 3-4.

<sup>28</sup> Id.

<sup>29</sup> CSXT Pet. 1, Feb. 21, 2014.

<sup>30</sup> Id. at 1-2.

requests that if the Board compels production of Amtrak's operating agreements with host railroads, those railroads be provided with copies of the undertakings signed by outside counsel and consultants so the railroads will know who has access to the agreements.<sup>31</sup>

On February 24, 2014, Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF) filed separate letters arguing that if their operating agreements were produced, they should be designated as "Highly Confidential" as provided for in the Board's protective order.<sup>32</sup> UP states that it believes its operating agreement is relevant and of great importance to the docketed proceedings.<sup>33</sup> BNSF argues that CN's request is quite broad and that, although BNSF does not object to production of its "main operating agreement" with Amtrak, it would not be appropriate or necessary to produce "other agreements" between it and Amtrak.<sup>34</sup>

On February 24, 2014, CN filed a reply stating that it did not object to the petitions filed by NS and CSXT or the letter filed by UP.<sup>35</sup> Furthermore, in a change from its earlier position,<sup>36</sup> CN states that it has no objection to the initial designation of these carriers' operating agreements as "Highly Confidential."<sup>37</sup>

On February 28, 2014, Amtrak filed a reply stating it had no objections to the NS and CSXT petitions and letters from UP and BNSF.<sup>38</sup> Amtrak argues that it "has its own interest in protecting the commercially sensitive and proprietary information in these [operating] agreements."<sup>39</sup> Amtrak states that if the Board is to adopt the approach suggested by the Class I railroads it must ensure that a "Highly Confidential" designation is preserved for the entire operating agreement to prevent in-house host railroad personnel from having access to the information.<sup>40</sup>

The Board will grant NS's and CSXT's petitions for partial intervention and will accept UP's and BNSF's letters into the record.

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<sup>31</sup> Id. at 4.

<sup>32</sup> UP Letter 1, Feb. 24, 2014; BNSF Letter 1-2, Feb. 24, 2014.

<sup>33</sup> UP Letter 1, Feb. 24, 2014.

<sup>34</sup> BNSF Letter 2, Feb. 24, 2014.

<sup>35</sup> CN Letter 1, Feb. 24, 2014. BNSF's February 24 letter was filed after CN's February 24 reply.

<sup>36</sup> See CN Motion 17, Feb. 14, 2014.

<sup>37</sup> CN Letter 2, Feb. 24, 2014.

<sup>38</sup> Amtrak Letter 2, Feb. 28, 2014.

<sup>39</sup> Id. at 4.

<sup>40</sup> Id.

## DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter” of the 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 & Aroostook 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). While CN’s Request No. 5 meets this standard, Request No. 6 does not.

Request for Production No. 5:

CN’s Request No. 5 seeks production of Amtrak’s operating agreements with host railroads. Operating 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’s 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. Amtrak argues that it is only the present commercial relationship between Amtrak and CN that is relevant and not past operating agreements with host railroads. But Amtrak has not demonstrated that its commercial relationship with CN is so unusual that the terms and conditions of Amtrak’s relationships with other host freight railroads could not provide any guidance to the Board. Therefore, the Board will require Amtrak to produce and serve upon CN all of Amtrak’s operating agreements with host railroads, including amendments, attachments, exhibits, and schedules, created or in effect from May 1, 2011, to October 31, 2013.<sup>41</sup>

Under the protective order that the parties jointly proposed and the Board adopted, the producing party is initially to designate requested materials as “Confidential” or “Highly Confidential,” subject to possible challenge. See Protective Order ¶¶ 2-3, 8. Amtrak, the producing party, has stated its position that if the documents must be produced, they should be designated “Highly Confidential,” and the other non-movant carriers agree. CN does not object to the initial designation of the operating agreements as “Highly Confidential” and will retain the right to challenge this designation as provided for in paragraph 8 of the Board’s protective order.

The Board will reject Amtrak’s proposal to selectively redact portions of the responsive agreements that Amtrak deems irrelevant and commercially sensitive before producing the agreements even under a “Highly Confidential” designation.<sup>42</sup> It would be inappropriate to

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<sup>41</sup> As noted above, BNSF has asserted that it would be inappropriate to compel discovery of “other agreements” beyond its “main operating agreement” with Amtrak. But BNSF does not explain that distinction or support its conclusion that the latter is relevant but the former are not. The Board therefore expresses no view on that issue except to note that Amtrak will be required to produce all documents within the scope of Request No. 5, as time-limited under the parties’ Joint Discovery Protocol.

<sup>42</sup> See Amtrak Reply 9-10 & Ex. 1 at 1, Feb. 19, 2014.

permit Amtrak preemptively to redact portions of the responsive agreements on relevance grounds without affording outside counsel and consultants for CN the opportunity to review the redacted material. Nor is it necessary or appropriate to do so on grounds of commercial sensitivity. The protective order jointly proposed by the parties and adopted in this case does not provide for such redactions from documents produced under a “Highly Confidential” designation; to the contrary, the Highly Confidential designation itself, under the Board’s protective order, provides sufficient protection. The Board has rejected similar proposals in the past and concluded that protective orders provide adequate safeguards from unauthorized or unintended disclosure. See Grain Land Coop. v. Canadian Pac. Ltd., NOR 41687, slip op. at 2-4 (STB served Dec. 1, 1997).

As no parties have objected to CSXT’s request that Amtrak and CN provide the host railroads whose operating agreements are produced with copies of any protective order undertakings executed by outside counsel or consultants who are granted access to those agreements, that request will be granted.

Request for Production No. 6:

CN’s Request No. 6 seeks the production of Amtrak’s operating agreements related to any hosting by Amtrak of non-Amtrak passenger service. The Board is not persuaded that these operating agreements are relevant to the subject matter of this proceeding. As Amtrak notes, these agreements with commuter authorities on the Northeast Corridor have been negotiated subject to a different statutory authority that does not limit host-carrier compensation to incremental costs.<sup>43</sup> Therefore, the Board will deny CN’s Request No. 6 because the production of operating agreements where Amtrak operates as the host railroad is unlikely to produce evidence relevant to the subject matter of this proceeding.

It is ordered:

1. NS’s and CSXT’s petitions for partial intervention are granted, and UP’s and BNSF’s letters are accepted into the record.
2. CN’s motion to compel Amtrak’s response to Request for Production No. 5 is granted as discussed above.
3. Amtrak and CN shall provide host railroads whose operating agreements are produced with copies of any protective order undertakings executed by outside counsel or consultants who are granted access to those agreements.
4. CN’s motion to compel Amtrak’s response to Request for Production No. 6 is denied.

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<sup>43</sup> Compare 49 U.S.C. § 24905(c)(1)(A), with 49 U.S.C. § 24308(a).

5. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.