

**EXPEDITED CONSIDERATION REQUESTED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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ENTERED

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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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**MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY TO COMPEL RESPONSES  
TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

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TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”) respectfully move the Board to compel National Railroad Passenger Corporation (“Amtrak”) to produce the documents requested in CN’s Request for Production of Documents Nos. 5 and 6, seeking Amtrak’s operating agreements with, respectively, (1) other railroads that host regular Amtrak service, and (2) passenger rail service providers that Amtrak itself hosts on lines it owns or controls (such agreements, collectively, “Amtrak’s OAs”).<sup>1</sup> Amtrak’s OAs are relevant, indeed likely to be highly probative, evidence in this proceeding; the Board has relied on such documents in the past; Amtrak has produced such documents in the past; and there is no legitimate basis for Amtrak withholding or conditioning its production of those documents.

CN also respectfully requests, in accordance with the Joint Discovery Protocol executed by Amtrak and CN (Ex. 2), that the Board decide this motion on an expedited basis. As both

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<sup>1</sup> Request Nos. 5 and 6 were included in the First Set of Disc. Reqs. of IC and GTW, served on October 31, 2013 (Ex. 1).

parties recognized in the Protocol, expeditious resolution of discovery motions is important to minimize further delays of the Board's schedule for this proceeding.<sup>2</sup>

### **FACTUAL BACKGROUND**

Amtrak filed its Application in this proceeding on July 30, 2013, seeking prescription, under 49 U.S.C. § 24308(a)(2)(A)(ii), of "reasonable terms and compensation" for Amtrak's use of CN's facilities (including rail lines) and services. On October 24, 2013, the parties filed statements with the Board identifying the disputed issues in this case.

On October 31, 2013, CN served its first set of discovery requests, including Request Nos. 5 and 6. In its response served November 19, 2013, Amtrak refused to produce any documents in response to Request Nos. 5 and 6, asserting objections as to relevance, burden, and confidentiality of third parties' sensitive commercial information.<sup>3</sup> CN's requests and Amtrak's responses were as follows:

#### **REQUEST FOR PRODUCTION NO. 5**

Please produce all of Amtrak's Operating Agreements, including amendments, attachments, exhibits, and schedules thereto, with Host Railroads, in force at any time since 1971.

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 5**

Amtrak objects to this Request for Production on the grounds that it is overbroad as to time, unduly burdensome and oppressive. Amtrak further objects to this Request for Production to the extent it seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. To the extent this Request for Production seeks operating agreements between Amtrak and CN, Amtrak further objects on the ground that these documents are equally available to, and in the possession, custody or control of, CN. To the extent this Request for Production seeks operating agreements between Amtrak and any Host Railroad other than CN, Amtrak further objects on the ground that the operating agreements contain highly confidential and commercially sensitive

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<sup>2</sup> Accordingly, the parties agreed that responses to motions to compel shall be due within seven days. Joint Disc. Protocol ¶ 11, at 14 (Jan. 30, 2014) (Ex. 2).

<sup>3</sup> Nat'l R.R Passenger Corp.'s Resps. and Objections to First Set of Disc. Reqs. of IC and GTW at 12-13 (served Nov. 19, 2013) (Ex. 3).

information of third parties. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak responds that it will not produce any documents in response to this Request for Production.

**REOUEST FOR PRODUCTION NO. 6**

Please produce 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.

**RESPONSE TO REOUEST FOR PRODUCTION NO. 6**

Amtrak objects to this Request for Production on the grounds that it is compound and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. Amtrak further objects on the ground that this Request for Production seeks agreements that contain highly confidential and commercially sensitive information of third parties. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak responds that it will not produce any documents in response to this Request for Production.

Ex. 3 at 12-13.

As broad discovery had been sought by each party,<sup>4</sup> and each party had lodged a variety of objections, counsel for the parties met and conferred on December 12 and December 17 to clarify, discuss, and attempt to resolve discovery issues. CN made a proposal, which Amtrak later accepted, that most of each party's document production requests, including Request Nos. 5 and 6, be limited to documents created or in effect on or after May 1, 2011.<sup>5</sup> Given the particular importance of Amtrak's OAs to the issues before the Board, CN stated at the initial meeting that it would file a motion to compel if Amtrak persisted in refusing to produce Amtrak's OAs. At the second meeting, Amtrak suggested with respect to Request No. 5 that if CN would indicate the portions of the operating agreements it particularly needed (without, however, having seen the agreements), Amtrak would consider producing only those portions. By letter dated

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<sup>4</sup> Amtrak's requests to CN included six requests for admission, 41 document requests, and 14 interrogatories. CN's requests included four requests for admission, 31 document requests, and 23 interrogatories.

<sup>5</sup> This proposal was incorporated in the parties' Joint Discovery Protocol (Ex. 2) ¶ 2, at 2.

December 27, 2013 (attached as Ex. 4), CN explained why that would not suffice.<sup>6</sup> However, conditioned on avoiding the necessity of a motion to compel, CN proposed a compromise under which Amtrak could propose redactions that would be subject to review by CN's outside counsel.

On January 31, more than a month later, and three months after CN had served its initial discovery requests, Amtrak finally responded to CN's compromise offer (Ex. 5). First, it offered only to provide portions of Amtrak's OAs with Class I carriers, thereby excluding all Amtrak operating agreements with other hosts and all Amtrak operating agreements in which Amtrak itself is a host. Second, it insisted on a unilateral right to redact the agreements prior to production, based on its own view of what is proprietary or commercially sensitive. It further provided that CN's counsel would have no access to the redacted materials to determine if those redactions were reasonable, and that in the event CN wished to challenge a redaction its recourse would be to Amtrak itself. Third, it required that CN agree in advance, sight unseen, that any portion of agreements Amtrak did produce would be classified as Highly Confidential under the Protective Order that has been entered in this proceeding,<sup>7</sup> meaning that no CN employees – including in-house counsel – could see any portion of any of Amtrak's OA. *See* Protective Order, App. at 3 (¶ 6). Finally, Amtrak conditioned its entire offer on CN waiving a partial objection CN had stated two months earlier to one of Amtrak's broadest and most burdensome discovery requests.

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<sup>6</sup> Among other points, CN explained that (1) it cannot reliably identify which provisions of Amtrak's OAs are important without having access to those OAs and when CN does not know what Amtrak will argue in this proceeding; and (2) contracts are integrated documents, in which one provision may define the terms used in another, and concessions on one provision may be traded off for concessions on another, so efforts to isolate particular provisions, or particular aspects of the contract, are apt to paint an incomplete and misleading picture. *See* Ex. 4.

<sup>7</sup> Decision served Dec. 16, 2013 ("Protective Order").

CN responded the next business day, February 3, clarifying the minimum criteria it believed necessary for a possible agreement (Ex. 6). On February 5, Amtrak rejected CN's proposal. Accordingly, the present position of the parties is that CN has modified its Request Nos. 5 and 6 to limit them to documents created or in effect from May 1, 2011 to October 31, 2013, but Amtrak has refused to produce any documents in response to those requests.<sup>8</sup>

### STANDARDS GOVERNING MOTIONS TO COMPEL

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);<sup>9</sup> *Ballard Terminal R.R. – Acquisition & Operation Exemption – Woodinville Subdivision*, Docket No. FD 35731, slip op. at 3 (STB served Aug. 22, 2013) (“*Ballard*”). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. in Aroostook County, Me.*, STB Docket No. AB-124 (Sub-No. 2), slip op. at 2 (STB served Nov. 14, 2003) (“*Waterloo*”), *quoted in Ballard*, slip op. at 3. Relevant information that is in the possession of one party but not the opposing party is discoverable, notwithstanding that it might also be obtainable from a non-party. *See Ballard*, slip op. at 4-5. Moreover, subject to other (non-relevance) objections, a party is entitled in discovery to “all relevant and potentially admissible information – ... not only the information that the [opposing party] believes is

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<sup>8</sup> CN recounts this history in order to demonstrate that it has diligently attempted to reach a compromise, and has endured lengthy delays caused by Amtrak, before bringing this motion. And in Section IV of the Argument below, CN will discuss further the “compromise” proposal that Amtrak ultimately made in order to explain why, if Amtrak raises it or something similar again, it is plainly insufficient. However, neither party should be held to compromise offers that it made conditioned on avoiding the costs and burdens of a motion to compel. *Cf.* Fed. R. Evid. 408(a).

<sup>9</sup> Further, “[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

sufficient.” *Seminole Elec. Coop. Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009).

If a party establishes a valid confidentiality objection, the confidential material must nonetheless be produced, without any confidentiality-based redactions.<sup>10</sup> Instead, the proper means of protecting confidentiality is a protective order. *See, e.g., Wisc. Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42051, slip op. at 3 (STB served June 21, 2000) (“*WP&L*”) (affirming ALJ order granting subpoena at request of party arguing that “the Board routinely permits discovery of [sensitive and confidential] materials subject to a protective order”); *Grain Land Coop v. Canadian Pac. Ltd.*, STB Docket No. 41687, slip op. at 3-4 (STB served Dec. 1, 1997) (“*Grain Land*”) (reversing an ALJ order insofar as it permitted redaction based on confidentiality, and ordering unredacted production of contracts, subject to a protective order).

## ARGUMENT

As discussed in Section I below, Amtrak has refused to produce requested documents – other passenger-host operating agreements – that are relevant, indeed likely to be highly probative, regarding the issues in this proceeding. Both the Board and the Interstate Commerce Commission (“ICC”) before it have discussed and relied on such documents in their decisions in cases under 49 U.S.C. § 24308(a)(2)(A)(ii) and its predecessor, section 402(a) of the Rail Passenger Service Act (“RPSA”). Further, in a previous case under 49 U.S.C. § 24308(a)(2)(A)(ii), which presented narrower issues than the present proceeding, Amtrak

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<sup>10</sup> Redactions have on rare occasion been permitted, but only when it has been established by agreement or decision that the material to be redacted is not just confidential, but also irrelevant. *See CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, Decision No. 34, slip op. at 2-3 (STB served Sept. 18, 1997) (where a party sought to redact information, “[i]f both the requesting party and Judge Leventhal reject applicants’ assertion that certain material contained in a responsive document is not relevant to any matter properly at issue in this proceeding, applicants are required to produce the document in its entirety.”). As discussed below, neither of these preconditions has been met.

agreed to produce (to a host railroad's employees, as well as its outside counsel) operating agreements between itself and other host railroads.

As explained in Section II, there is no undue burden here. As narrowed, CN's Requests seek only Amtrak's operating agreements in effect during the period May 1, 2011 to October 31, 2013. Those documents are important for this case. They are modest in number (particularly in the context of the much broader and burdensome document requests served by Amtrak), and they should be easy to find and produce.

As discussed in Section III, Amtrak also seeks to withhold its operating agreements based on its claim that they contain highly confidential and commercially sensitive information of third parties. Its prior production of such agreements belies its present argument that it must withhold or redact such agreements. Even if there are valid third-party confidentiality concerns, such concerns are properly dealt with under the Board's Protective Order, not by denial of production or by redaction. In any event, no such concerns are apparent. The Board has publicly discussed, and Amtrak has produced, and itself relied upon, third party operating agreement provisions in past cases – a history that belies Amtrak's confidentiality claim. Moreover, Amtrak has not shown that the operating agreements contain third parties' proprietary commercially sensitive information, much less that third parties took any steps to preserve any confidentiality.

Finally, lest Amtrak seek to persuade the Board to adopt its earlier "compromise" proposal regarding Request No. 5, we explain in Section IV why that proposal is inconsistent with CN's discovery rights. (Amtrak offered nothing in response to Request No. 6.)

**I. THE DOCUMENTS SOUGHT IN REQUEST NOS. 5 AND 6 ARE RELEVANT, INDEED LIKELY TO BE HIGHLY PROBATIVE, EVIDENCE IN THIS CASE.**

Amtrak asserts that its agreements with other host railroads (Request No. 5) and its agreements with other passenger rail carriers when it serves as a host (Request No. 6) are irrelevant to this proceeding. To evaluate that assertion, it is necessary first to consider the breadth of the issues presented.

Amtrak and CN were engaged in voluntary commercial negotiations for a new operating agreement until July 30, 2013, when, in lieu of continuing those negotiations, Amtrak initiated this proceeding. Under the governing statute, the purpose of this proceeding is for the Board to serve as a substitute when the preferred method of determining the terms of an agreement between Amtrak and a host railroad – voluntary negotiation – fails. *See* 49 U.S.C.

§ 24308(a)(1)-(2); *Minn. Transfer Ry. Ordered to Provide Servs., Tracks, & Facilities for Operations of Trains of Nat'l R.R. Passenger Corp. & Establishment of Just & Reasonable Compensation for Such Servs., Tracks & Facilities*, 354 I.C.C. 769, 774 (1978) (“*Minnesota Transfer IP*”) (“Under the statute the parties must be given the opportunity to resolve [operating agreement issues] among themselves before our jurisdiction to arbitrate the matter is invoked.”).

The parties having reached that point, the Board’s statutory task is to determine what would be “reasonable terms and compensation” to govern the Amtrak-CN relationship. 49 U.S.C.

§ 24308(a)(2)(A)(ii). The law offers some additional guidance. For example, the statute indicates that the host railroad should recover “the incremental costs of [Amtrak’s] using the [host’s] facilities and the [host’s] providing the services [to Amtrak],” plus potentially “greater” compensation based in part on “quality of service,” *id.* § 24308(a)(2)(B), and that the operating agreement should include some provision for “a penalty for untimely performance,” *id.*

§ 24308(a)(1). However, the statute does not specify an amount, a formula, or criteria, and it

provides no guidance on most non-compensation issues. Thus, for the most part, the Board’s task is to decide what a “reasonable” commercial agreement between the parties would look like.

As a matter of common sense, one of the most likely probative sources of evidence relevant to that inquiry must be voluntary commercial agreements reached in the marketplace by firms in similar situations, especially voluntary commercial agreements involving one of the parties.<sup>11</sup> For example, if a proposed term, or the combined effect of a proposed set of terms, is contrary to what most host railroads have voluntarily agreed with Amtrak, or if it is contrary to what Amtrak has agreed with most of the passenger rail carriers it hosts, that is evidence tending to suggest that such term is (or terms are) unreasonable.<sup>12</sup> On the other hand, if a proposed term is consistent with terms of most other host railroad agreements, that is evidence tending to suggest that it is reasonable.<sup>13</sup>

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<sup>11</sup> Of course, such evidence cannot trump the specific requirements of the statute itself, such as the general entitlement of host carriers to compensation for incremental costs associated with Amtrak’s services on their lines. *See National R.R. Passenger Corp. – Application under Section 402(a) of Rail Passenger Serv. Act for Order Fixing Just Compensation*, 10 I.C.C.2d 863, 876 n.37 (1995) (“*Conrail*”) (“Incremental cost, not comparability with Amtrak’s other contracts, is the statutory standard under section 402(a).”). Moreover, what is reasonable will vary with circumstances. But for purposes of relevance and discoverability the issue is not whether the information is conclusive, but rather whether it “*might* be able to affect the outcome of a proceeding.” *See Waterloo*, slip op. at 2 (emphasis added).

<sup>12</sup> Analogously, the first thing federal courts look to in determining what “reasonable royalty” should be awarded in a patent suit is what royalties the patentee recovers under license agreements with third parties in the marketplace. *See, e.g., LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 69 (Fed. Cir. 2012) (“The first of the fifteen factors in *Georgia-Pacific* [the standard federal court multi-factor test for determining reasonable royalties] is ‘the royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.’ . . . Actual licenses to the patented technology are highly probative as to what constitutes a reasonable royalty for those patent rights because such actual licenses most clearly reflect the economic value of the patented technology in the marketplace.”) (citations omitted).

<sup>13</sup> In some respects, the relevance and probative value of agreements requested in CN’s Request No. 6, in which Amtrak is the host carrier on its own line for other passenger rail carriers, may be even greater. Such agreements involve all the issues regarding host costs and compensation, on-time performance, mutually caused delays, dispatching, scheduling, record-

There are also strong legal and policy reasons for valuing consistency with actual marketplace transactions. If the Board were to ignore commercial realities and prescribe terms that Amtrak could not plausibly obtain in voluntary commercial negotiations, the Board would be failing in its statutory task of serving as a substitute for voluntary negotiations. Further, Amtrak would have every incentive to skip negotiations and come straight to the Board to set the terms of all of its “agreements.”<sup>14</sup>

Precedent supports the production and use of Amtrak’s third-party operating agreements in proceedings under 49 U.S.C. § 24308(a)(2)(A)(ii). The Board, and its predecessor, the ICC, have considered and discussed evidence from Amtrak’s agreements with other host railroads in many such proceedings. *See, e.g., 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) (declining to require Amtrak to acquire additional liability insurance or other security for its indemnity obligations to host railroad, noting that there was no such requirement in operating agreements with other host railroads); *Nat’l Rail Passenger Corp. Application Under Section 402(a) of Rail Passenger Serv. Act*, Finance Docket No. 30426, slip op. at 12 (ICC served July 15, 1985) (adopting Amtrak proposal for incentive payment system similar to incentive arrangements in other operating agreements); *Minn. Transfer Ry. Ordered to Provide Servs., Tracks & Facilities for Operations*

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keeping and accounting inherent in such a relationship. If Amtrak typically agrees to the same resolution of a particular issue both when it is the host and when it is the guest, that could be strong evidence that such a resolution is reasonable. If Amtrak refuses to accord passenger operators on its lines the same treatment it demands as a passenger guest on CN’s lines, that evidence could suggest that Amtrak bears a burden to justify the reasonableness of the disparity in treatment. In either case, the information sought in Request No. 6 can be expected to bear on the outcome of this proceeding.

<sup>14</sup> As Amtrak has recognized in the past, the appropriate policy for the Board in administering the statute is “to encourage voluntary agreements between the parties.” Amtrak Resp. to Conrail Modifications to Pet. to Set Basis for Assessing Minimum Amount Due from Amtrak at 4-5, *Conrail* (Ex. 7).

*of Trains of Nat'l R.R. Passenger Corp. & Establishment of Just & Reasonable Compensation for Such Servs., Tracks & Facilities*, 354 I.C.C. 552, 558 & n.7 (1978) (“*Minnesota Transfer P*”) (declining to “substitute [the ICC’s] judgment for that of the marketplace” and therefore adopting (as proposed by Amtrak) specific provision for allocation of liability “used ... in virtually all [Amtrak’s] operating agreements,” and “developed through extensive arm’s length negotiations with ... various railroad’s [*sic*]”); *Nat'l R.R. Passenger Corp., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 926, 949 (1977) (“given the fact that Amtrak has used the ‘Amtrak formula’ in its negotiations with other railroads, any variance of that formula directed solely against [the respondent host railroad] will have to be adequately explained.”). Thus, evidence from other host railroad operating agreements not only “might be able to affect the outcome of a proceeding [under 49 U.S.C. § 24308(a)(2)(A)(ii)],” *Waterloo*, slip op. at 2, it has regularly done so.

Amtrak’s contrary position is indefensible. It may also be novel. In *Conrail*, Consolidated Rail Corporation (“Conrail”) served an interrogatory on Amtrak that asked about the contents of Amtrak’s operating agreements with other host railroads – essentially, the interrogatory equivalent of CN’s Request No. 5 here. Amtrak’s response, less than a month later, was as follows:

(a) Copies of Amtrak's contracts with other railroads and commuter authorities and their affiliates relating to Amtrak’s use of their main line tracks and in effect after January 1, 1987 are being provided herewith. Amtrak objects to the identification and production of contracts relating to the use of facilities other than main line tracks and of contracts unrelated to payments for track maintenance as irrelevant to any issue in this proceeding and as unduly burdensome.

Amtrak's Resp. to First Interrogs. & First Req. for Produc. of Docs. of Consol. Rail Corp. at 3, *Conrail* (filed Oct. 11, 1994) (Ex. 8).<sup>15</sup> That prompt and forthcoming response sharply contrasts with Amtrak's response in the present case.

Amtrak's response in *Conrail* raises one final point about relevance. With respect to operating agreements, as with any other evidence, what is relevant depends on the scope of the issues in the case. In *Conrail*, the single substantive issue before the Board was the quantification of compensation for incremental main line maintenance-of-way costs. Despite the narrow issue presented, Amtrak recognized the relevance of operating agreements, and willingly produced its agreements that included compensation terms for the use of main line tracks,<sup>16</sup> subject only to a confidentiality designation that permitted both outside and in-house personnel access to those documents for use in the proceeding.<sup>17</sup>

Here, the case for production is much stronger. Because Amtrak abruptly initiated this proceeding before the conclusion of negotiations, a wide array of issues was left unresolved. Moreover, according to Amtrak's Statement Identifying Disputed Issues, it proposes to present issues that were never the subject of focused discussions between the parties. If that statement is

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<sup>15</sup> Amtrak may have produced third party operating agreements in other proceedings, but CN is not in a position to know. (CN's counsel happened to be Conrail's counsel in *Conrail*.) Obtaining discovery requests and responses in old cases involving other parties is difficult, particularly for proceedings after 1996, when the Board eliminated the requirement that such documents be filed with the Board.

<sup>16</sup> Amtrak objected on grounds of relevance and burden only to the production of agreements unrelated to compensation for costs of maintaining main line tracks. Significantly, however, Amtrak did not seek to redact agreements in order to isolate the provisions that directly addressed that issue. Redaction based on relevance is generally inappropriate, particularly in the case of contracts, which are integrated documents in which various provisions interact and may represent a trade off during negotiations. Moreover, once the universe of documents to be produced is determined, redaction only increases the burden of production and the potential for discovery disputes.

<sup>17</sup> See Stipulation and Order Regarding Production of Confidential Documents, *Conrail* (filed May 26, 1994) (Ex. 9).

indicative, this case will present one of the broadest sets of issues the Board (or the ICC) has ever addressed in a case under 49 U.S.C. § 24308(a)(2) or section 402(a) of RPSA.

Amtrak lists as disputed issues:

- “[t]he amount of compensation CN [should] receive[.]” for providing services to and making its facilities available to Amtrak;
- “whether, and if so, under what terms, CN should receive compensation in excess of CN’s incremental costs for quality of service,” including the “formulation” and “administration” of such incentive payments;
- “under what terms CN should be subject to penalties for untimely performance, including the formulation of such penalties and the administration thereof”;
- the “geographic scope” of any new operating agreement between CN and Amtrak, including a potential extension to the rail lines of non-party affiliates; and
- the “date and terms for expiration or termination of the Operating Agreement.”

Statement by Nat’l RR. Passenger Corp. Identifying Disputed Issues at 2 (filed Oct. 24, 2013). If this case encompasses “compensation,” “incremental costs,” incentives, “penalties,” “geographic scope,” “date and terms for expiration” and “termination,” there will be few, if any, aspects of a host railroad-passenger rail carrier operating agreement that it does not encompass. Amtrak’s relevance objection is without basis.

## **II. AMTRAK’S “UNDUE BURDEN” OBJECTION SHOULD BE REJECTED.**

Amtrak’s objections to Request No. 5 include an assertion that responsive production would be “unduly burdensome and oppressive.” This appears to be boilerplate, and it is unclear whether Amtrak intended this to be an objection independent of its relevance objection or whether Amtrak will persist with this objection after CN’s concession limiting the applicable date range (which moots Amtrak’s further objection that the Requests as originally stated were “overbroad as to time”). In any event, there is no substance to it.

First, whether the burden of discovery is undue depends substantially on the relevance and probative value of the materials sought. Here, as demonstrated in Section I above, the materials sought are relevant and likely to be highly probative.

Second, CN's request is narrow. Amtrak has been using other host railroads' lines since 1971. Although current agreements are more probative, since they reflect current economic realities, a complete history of Amtrak's operating agreements could be probative as to what has been accepted and worked in the marketplace, and how terms have evolved, over time. Moreover, since it appears that most operating agreements historically had long terms, it would likely not be very burdensome for Amtrak to produce such a history. In *Conrail*, according to Amtrak's discovery response quoted above, Amtrak apparently produced more than seven years' worth of operating agreements (from January 1, 1987 to its response in October 1994). Here, however, CN voluntarily agreed to limit its request to agreements created or in effect in the 30 months from the execution of the most recent CN-Amtrak operating agreement to the date of CN's document requests.

Third, any burden of production here is likely to be minimal. Amtrak's operating agreements with host railroads are a distinct and easily identifiable category of documents. Since they govern important commercial relationships, typically over a term of years, they are likely to be maintained in readily accessible files in the ordinary course of business. And because they are, by definition, documents executed by an independent counterparty, they cannot raise any issues of attorney-client privilege or work product protection that might necessitate legal review before production.

Nor is the requested production likely to be voluminous. To be sure, commercial agreements can be lengthy, and to understand the bargain between the parties and to see individual terms in context, CN needs and has requested complete agreements, including

exhibits, addenda, schedules, and amendments. (Much of the substance of the most recent CN-Amtrak agreement was contained in appendices.) But the quantity of agreements covered by Request No. 5 is likely small. Without limiting that Request, CN notes that Amtrak's monthly Host Railroad Performance Reports identify only 19 host railroads. So, even if some relationships were covered by two or three distinct agreements during the 30-month period of CN's Requests, there are likely fewer than 40 agreements in total.

Finally, any burden objection should be viewed in context. Amtrak initiated this proceeding and has stated an extraordinarily broad range of issues. Amtrak has so far served 41 requests for document production on CN, including numerous requests that are far broader, more burdensome and less relevant than CN Request No. 5, as well as 14 interrogatories and six requests for admission.<sup>18</sup> In that context, the burden of responding to CN's Request No. 5, which is likely to require production of fewer than 40 discrete agreements, is relatively minimal.<sup>19</sup>

### **III. AMTRAK'S CLAIMS OF THIRD-PARTY COMMERCIAL SENSITIVITY AND CONFIDENTIALITY PROVIDE NO BASIS FOR WITHHOLDING PRODUCTION.**

Amtrak's responses to Request Nos. 5 and 6 included an objection that the requested agreements "contain highly confidential and commercially sensitive information of third parties." That is not a proper basis for refusing production (as Amtrak did in its responses, and has consistently done with respect to Request No. 6), or for redaction (as Amtrak suggested,

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<sup>18</sup> Nat'l R.R. Passenger Corp.'s First Set of Reqs. for Disc. (served Nov. 6, 2013) (Ex. 10).

<sup>19</sup> Amtrak has not raised a specific burden objection to Request No. 6, although in its response to CN's discovery requests it stated a general burden objection that it might claim applies to Request No. 6. CN is aware of only five carriers providing passenger service on Amtrak's lines, however, so it would appear that Request No. 6 calls for no more than 10 or so additional agreements.

along with other unreasonable conditions, in its final “compromise” proposal). Moreover, Amtrak’s third-party confidentiality claim is unsubstantiated and implausible.

**A. Any Confidentiality Concerns Implicate the Protective Order, Not Withholding of Production.**

Issues of commercial confidentiality are common in Board proceedings, and there is a well established way to address them: by full production subject to an appropriate protective order. *See, e.g., Grain Land*, slip op. at 4 (“Even in situations where rail carriers object to a complainant’s access to unredacted material due to its extraordinary commercial sensitivity, we have found that protective orders provide adequate safeguards from unauthorized or unintended disclosure.”).<sup>20</sup> Confidentiality is not a proper basis for refusing or redacting production. Accordingly, the Board has ordered a party that produced a document with confidentiality-based redactions to produce it in unredacted form, *Ill. Railnet, Inc. – Acquisition & Operation Exemption – BNSF Ry.*, STB Finance Docket No. 34549, slip op. at 2 (STB served Apr. 15, 2005), and when an ALJ permitted redaction on confidentiality grounds, the Board reversed that ruling, *Grain Land*, slip op. at 3-4.

At the joint request of Amtrak and CN, the Board entered a Protective Order in this case on December 16, 2013. That order provides ample protection and detailed rules for the handling

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<sup>20</sup> The Board’s strong preference for using protective orders to protect confidentiality rather than permitting withholding of relevant information is consistent with the approach of the federal courts. *See, e.g., Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 362 n.24 (1979) (“[O]rders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel.”). As reflected in federal court practice, it should not matter in this regard whether a producing party asserts its own confidentiality rights or duties of confidentiality to third parties. *See, e.g., Robert Bosch LLC v. ADM 21 Co.*, 2011 U.S. Dist. Lexis 102639, at \*3-\*4 (D. Nev. Sept. 12, 2011) (“Because the Settlement Documents are relevant, and there is a Stipulated Protective Order in place, Bosch’s third-party confidentiality obligations should not bar production of these documents.”).

of “Confidential” and “Highly Confidential” materials.<sup>21</sup> It allows the producing party to make those designations, subject to review by the Board if the receiving party objects. If and insofar as Amtrak has a valid basis for asserting confidentiality, the Protective Order provides all the protection it needs. Here, consistent with Amtrak’s agreed production of its operating agreements to Conrail’s in-house personnel as well as outside counsel in the *Conrail* proceeding, and in order to avoid any unnecessary future dispute or delay, CN asks the Board to provide that Amtrak may not categorize the requested operating agreements (or any part thereof) as “Highly Confidential” pursuant to the Protective Order.

**B. Amtrak’s Confidentiality Claim Is Unsubstantiated and Implausible.**

Amtrak’s discovery responses did not base its refusal to produce on protecting any information of its own, but instead on unidentified “highly confidential and commercially sensitive information of third parties.”

A party that shares its commercial information with an independent entity – for example, in a contract -- generally thereby waives any claim to confidentiality unless it takes affirmative steps to protect confidentiality, such as entering into a confidentiality agreement. In general, it is the existence of such an agreement or other affirmative duty to protect third-party confidential information that is the basis for an objection to the production of such information.<sup>22</sup> And even

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<sup>21</sup> “Highly Confidential” materials cannot be shared with the parties’ in-house counsel or other employees. That designation represents a severe restriction on the ability of the parties to consult with their outside counsel, and it could potentially constrain parties’ counsel to file redacted submissions and briefs that their client could not see in unredacted form. Accordingly, particularly for highly probative material – such as the evidence at issue here – it is important that the “Highly Confidential” designation not be abused.

<sup>22</sup> In the absence of such an agreement or duty, a party generally lacks standing to assert the rights of an independent third party. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Diamantis v. Milton Bradley Co.*, 772 F.2d 3 (1st Cir. 1985), for example, the First Circuit dismissed for lack of standing a party’s claim that a subpoena infringed on “the right of a nonparty to keep confidential his own financial affairs,” *id.* at 4.

then, any such agreement or duty to protect the third-party confidential information can be overcome by a Board order compelling production of that information subject to the provisions of a protective order. *E.g., Grenada Ry. – Abandonment Exemption – In Montgomery, Carroll, Holmes, Yazoo & Madison Counties, Miss.*, Docket No. AB 1087 (Sub-No. 1X), slip op. at 5 (STB served Dec. 16, 2013) (ordering parties to produce, subject to protective order, “rail transportation contracts or other documents or information” containing third-party confidentiality provisions that could not otherwise be produced); *Paulsboro Refining Co. – Adverse Abandonment – In Gloucester County, N.J.*, Docket No. AB 1095 (Sub-No. 1), slip op. at 6 (STB served July 26, 2012) (providing for “production, disclosure and use” pursuant to protective order of documents subject to protection from disclosure under 49 U.S.C. § 11904).

Three months and many communications after CN’s discovery requests, Amtrak has done nothing to establish that it is under any contractual or other duty to protect from disclosure third-party information in Amtrak’s OAs, much less establish a basis for withholding that information if ordered by the Board to produce it. Amtrak has not claimed – much less shown – that its agreements with third parties include a duty of confidentiality.

In fact, there is every reason to believe that Amtrak’s operating agreements with third party railroads are not, and were not intended to be, confidential. Upon its creation in 1971, Amtrak negotiated a common Basic Agreement with the collective representatives of its host railroads. *See Nat’l R.R. Passenger Corp., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 926, 926-27 (1977); James A. Bistline, et al., *The Negotiation of the Amtrak Contract* (1971). The basic terms of that first operating agreement, which has served at least in part as a model for subsequent operating agreements, were a matter of public record. *See, e.g., Bistline, et al. supra*, at 26-141.

Like the Basic Agreement, CN's operating agreement with Amtrak does not include any duty or other indicia of confidentiality. And the same is true of the two previous Amtrak-CN operating agreements, which were in effect between 1995 and 2011, and of two Amtrak operating agreements with other carriers that CN has discovered on the internet.<sup>23</sup> (Of course, the availability of those agreements on the internet further undermines any general claim of confidentiality for those or similar agreements.)

Moreover, both the Board and Amtrak have treated the provisions of Amtrak's OAs as subject to disclosure. As we have already noted, the Board has discussed third-party operating agreements in its public decisions.<sup>24</sup> Moreover, the Board has prescribed specific terms and discussed specific costs in those decisions.<sup>25</sup> Meanwhile, Amtrak did not raise a confidentiality objection as a basis to resist production of its operating agreements to Conrail in 1994, notwithstanding that there was no provision in the protective order in that case for withholding any documents from employees of the parties.<sup>26</sup> And Amtrak itself has relied on third-party operating agreements in open submissions to the Board.<sup>27</sup> Of course, it would be quite unfair to

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<sup>23</sup> See Agreement Between National Railroad Passenger Corporation and CSX Transportation, Incorporated (June 1, 1999, amended through Apr. 29, 2002), *available at* <http://corporate.sunrail.com/uploads/docs/149.pdf>; Agreement Between National Railroad Passenger Corporation and the Florida Department of Transportation (Dec. 30, 2010), *available at* <http://business.sunrail.com/uploads/allprojectdocs/751.pdf>.

<sup>24</sup> See, e.g., *Amtrak – Use of Tracks & Facilities & Establishing Just Compensation*, Finance Docket No. 31062, slip op. at 1 (ICC served Apr. 15, 1988) (referring to provision in operating agreement with host railroad's predecessor, under which host railroad received compensation of \$1,696.54 for permitting operation of two special trains); see also cases cited on pages 10-11, above.

<sup>25</sup> See, e.g., *Conrail*, 10 I.C.C.2d at 894 (prescribing compensation for maintenance-of-way costs at a rate of \$1.445 per 1000 gross ton-miles); *Minnesota Transfer II*, 354 I.C.C. at 774-79 (prescribing specific monetary compensation for use of tracks, maintenance of tracks, and use of roundhouse).

<sup>26</sup> See Ex. 7.

<sup>27</sup> See, e.g., Nat'l R.R. Passenger Corp's Opening Evidentiary Submission, V.S. James L.

allow Amtrak to use cherry-picked provisions from third-party operating agreements when they help its case, but hide behind claims of third-party confidentiality with respect to specific provisions or broader context when it may hurt its case.<sup>28</sup>

Finally, Amtrak's premise that the operating agreements contain "commercially sensitive information of third parties" that should be kept from CN is implausible. With respect to Request No. 5, Amtrak claims that those third parties "are direct competitors to CN" (Ex. 5 at 1).<sup>29</sup> But that is certainly not true with respect to passenger service, which is the subject of the Amtrak OAs. CN is a freight railroad with an obligation to host Amtrak; it does not compete with other railroads to host Amtrak's or other passenger rail business. Moreover, no other rail carriers host or have the right (*e.g.*, through trackage rights) to host Amtrak trains over the routes

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Larson at 19-21 & Attachment 1 (filed Apr. 15, 1997), *Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry.*, STB Finance Docket No. 33381 (filed Apr. 15, 1997) (detailed evidence regarding liability allocation provisions, and provisions for monetary payments to host railroad for increased liability risk resulting from Amtrak operations, in 13 operating agreements; proposing prescription of similar allocation by Board) (Ex. 11); Nat'l R.R. Passenger Corp.'s Statement of Evidence, Tab A (V.S. Elizabeth C. Reveal) at 4, *Conrail* (filed Aug. 29, 1994; errata filed Sept. 29, 1994) (arguing that Amtrak's preferred cost model "is the basis for the incremental track maintenance payments Amtrak makes to every railroad other than Conrail over which it operates") (Ex. 12); *see also id.*, Tab A at 6-7 (criticizing Conrail as a unique hold-out against the terms Amtrak agreed with all its other hosts); *id.*, Tab B (V.S. William W. Whitehurst) at 6 ("Amtrak has used [its preferred costing] formula in its contract negotiations with U.S. railroads since it was developed.") (Ex. 13); Application, V.S. James L. Larson at 4-9, *Nat'l Rail Passenger Corp. Application Under Section 402(a) of Rail Passenger Serv. Act*, Finance Docket No. 30426 (filed Feb. 28, 1984) (describing, and proposing that the ICC prescribe, "[t]he basic elements of Amtrak's incentive performance arrangements" with other host railroads) (Ex. 14).

<sup>28</sup> *Cf. Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.") (citations omitted).

<sup>29</sup> Amtrak does not and cannot make such a claim with respect to Request No. 6, which concerns passenger rail providers running on Amtrak's tracks.

Amtrak runs over CN's lines, and most passenger rail stations served by Amtrak from CN's lines cannot be served from the lines of other freight carriers.

Further, disclosure of Amtrak's OAs' terms would not affect freight service competition. For example, CN's business strategy for *freight* traffic will not be affected if it discovers the formulas for the incentives and penalties that other railroads receive based on Amtrak *passenger* train performance on their lines. And similarly, the provisions of other host railroads' operating agreements, which give effect to the statutory right to recover the incremental cost of hosting *Amtrak*, are unlikely to reveal anything of substance about the costs of carrying *freight* traffic.<sup>30</sup>

In short, there is no evidence that Amtrak's counterparties want, have taken measures to secure, or need, any confidentiality protection against disclosure to CN. It is much more plausible that Amtrak is using its unsupported claim of third party confidentiality in an effort to retain for litigation purposes its monopoly over the body of relevant agreements governing like circumstances it has with other entities.

#### **IV. AMTRAK'S "COMPROMISE" OFFER WITH RESPECT TO REQUEST NO. 5 WAS IMPRACTICAL, BURDENSOME, AND UNFAIR TO CN, AND IT FELL FAR SHORT OF MEETING AMTRAK'S DISCOVERY OBLIGATIONS.**

As demonstrated above, CN is entitled to the materials encompassed by its Request Nos. 5 and 6, and there are no valid grounds for objecting to their production. Accordingly, the

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<sup>30</sup> For many categories of costs compensated pursuant to operating agreements, no cost data are reflected in the agreements themselves; the agreements merely provide that the host railroad shall be entitled to whatever "actual" costs it can demonstrate. And where specific costs are provided, the costs tend to be highly aggregated (*e.g.*, an overall train-mile charge for maintenance costs), and/or relate to facilities specific to an individual host (*e.g.*, charges for the use of specific facilities), and/or provide incremental costs of minor items or items specific to passenger operations or services (*e.g.*, station rental or utility costs, locomotive rental costs). Moreover, costs identified in operating agreements would in any event be inherently unreliable for determining competing freight costs, as those costs are always potentially subject to modification through negotiation and trade-off, and are in many or most cases stale, having been established many years ago, then adjusted using general industry indices.

appropriate relief is to require Amtrak to produce those documents forthwith, with no greater confidentiality designation than is appropriate under the Protective Order.

It would be insufficient and improper to adopt Amtrak's belated January 31, 2013 "compromise" proposal regarding the operating agreements subject to Request No. 5 (Ex. 5).<sup>31</sup>

The substance of Amtrak's proposal was as follows:<sup>32</sup>

- Amtrak's offer was limited to agreements regarding Amtrak operations over lines of Class I host railroads; it offered nothing with respect to agreements regarding Amtrak operations over lines of other hosts, and nothing with respect to agreements with other carriers in which Amtrak is the host.
- Amtrak demanded that CN agree to treat as "Highly Confidential" whatever portions of Amtrak's OAs it deigns to produce, despite the lack of any established basis for claiming confidentiality (*see* Section III.B, above), which treatment would prevent CN's in-house counsel and other employees assisting with the proceeding from seeing or understanding Amtrak's OAs.
- Amtrak insisted on a unilateral right to redact operating agreements prior to production as Amtrak "believes ... appropriate," based on Amtrak's view of what is proprietary and commercially sensitive to third parties.
- Amtrak also insisted that its redactions be done prior to production, with the effect that no one would ever see the actual material Amtrak might choose to redact, even for the limited purpose of considering the propriety of the redactions.
- The only recourse for CN provided by Amtrak would be for CN's outside counsel (the only ones who would be permitted to review any aspect of Amtrak's OAs, although even they could not see what had been redacted) to "raise ... concerns [regarding redactions] with Amtrak's outside counsel."

In sum, after months of delay, Amtrak's final "compromise" proposal was that Amtrak would produce whatever portions it "believes ... appropriate" of a handful of Amtrak's OAs, while barring CN counsel from reviewing those redactions and requiring CN to agree that its in-

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<sup>31</sup> Amtrak made no compromise offer with respect to Request No. 6.

<sup>32</sup> We focus here only on the structural inadequacies of Amtrak's offer, leaving aside its unreasonable effort to tie its agreement to produce anything in response to Request No. 5 to a demand that CN waive its partial objections to an unrelated Amtrak document request. CN has stated its willingness to discuss that and other outstanding issues with Amtrak, *see* Ex. 6, but they are irrelevant to CN's entitlement to production in response to CN's Request Nos. 5 and 6.

house counsel and other employees cannot see any portion of those documents. Because all the documents are relevant, confidentiality has not been established, and, in any event, confidentiality is not a basis for withholding or redaction, Amtrak's proposal falls far short.

### CONCLUSION

The Board should order Amtrak to produce in full Amtrak's operating agreements as requested in CN's Request Nos. 5 and 6, insofar as they were created, in force, or in effect at any time during the period from May 1, 2011 to October 31, 2013. Further, consistent with Amtrak's production of such agreements in the *Conrail* proceeding, the Board should prohibit Amtrak from designating those documents, or any portion of them, as "Highly Confidential."<sup>33</sup> Finally, the Board should give expedited consideration to this motion, in accordance with the Joint Discovery Protocol agreed to by Amtrak and CN.

Respectfully submitted,

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February 12, 2014

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<sup>33</sup> CN acknowledges that under the Protective Order, the normal course is for the producing party to make confidentiality designations, subject to Board review. But in this instance, Amtrak's confidentiality claims are already before the Board, their lack of merit is apparent, and precluding over-designation of Amtrak's OAs as "Highly Confidential" would avoid a potential further dispute. CN is not requesting that the Board's order preclude Amtrak from designating Amtrak's OAs as "Confidential," however, as Amtrak doing so would not impair CN's ability to develop and present its case.

# **EXHIBIT 1**

## **EXHIBIT 2**

## **EXHIBIT 3**

## **EXHIBIT 4**

## **EXHIBIT 5**

## **EXHIBIT 6**

## **EXHIBIT 7**

## **EXHIBIT 8**

## **EXHIBIT 9**

## **EXHIBIT 10**

# **EXHIBIT 11**

## **EXHIBIT 12**

## **EXHIBIT 13**

## **EXHIBIT 14**

## CERTIFICATE OF SERVICE

I certify that I have this 12th day of February, 2014, caused a true copy of the foregoing Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Requests for Production of Documents, to be served by e-mail upon:

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