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VIA E-FILING

March 6, 2015

237891

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

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Office of Proceedings
March 6, 2015
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Public Record

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

Dear Ms. Brown:

In the decision served September 23, 2014 (the “September 23 decision”), the Board ordered specific actions with respect to the discovery process in the above proceeding. *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24398(a)—Canadian Nat’l Ry. Co.*, FD 35743, slip op. at 12 (STB served Sept. 23, 2014). In accordance with that decision, this letter provides the Board with notification that Amtrak has taken the specific actions directed by the Board and that the discovery production to CN is complete.

In the September 23 decision, the Board ordered Amtrak to produce “all agreements negotiated pursuant to an avoidable cost structure (including any amendments, exhibits, attachments or schedules thereto) that relate to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak and that were created, revised, sent, or in effect from May 1, 2011, to October 31, 2013.” *Id.* at 9. The Board also ordered Amtrak to produce “all documents relating to criticism and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes; (ii) Amtrak’s internal processes for and inconsistencies in reviewing coding issues; and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (e.g., imposing time limits on carriers seeking to identify coding errors)” (herein referred to as “Delay Coding Documents”). *Id.* at 10. The Board directed the parties to meet and confer by September 30, 2014 to formulate a list of document custodians whose files will be searched for responsive documents. *Id.* at 12. Finally, the Board ordered Amtrak to notify the Board when its production to CN is complete. *Id.*

Amtrak has provided CN with all agreements (including any amendments, exhibits, attachments or schedules thereto) that relate to any hosting by Amtrak of non-Amtrak passenger service on rail lines owned, leased, or operated by Amtrak and that were created, revised, sent, or in effect from May 1, 2011, to October 31, 2013, in addition to the earlier productions of operating agreements to comply with the Board’s April 15, 2014 decision. In

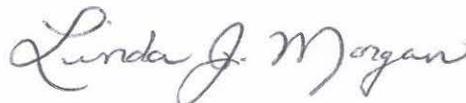
addition, Amtrak made a final production of approximately 10,000 Delay Coding Documents on Friday, February 28, 2015. This production includes a report from the TDRS system that contains all the data in TDRS that relates to delay coding within the agreed upon discovery period. Thus, Amtrak's production to CN in accordance with the September 23 decision is complete, and this letter serves as notification thereof.

Amtrak also has kept the Board informed regarding overall discovery production efforts. In response to the Board's decision served February 3, 2015, Amtrak provided a status report dated February 10, 2015 on the progress of discovery in connection with CN's Third Motion to Compel (herein referred to as "Status Report"). See Exhibit A. In its Status Report, Amtrak indicated that it had produced ridership and revenue data consistent with what Amtrak offered to produce in its reply to CN's Third Motion to Compel.

In connection with this Status Report, Amtrak also provided the Board with a letter dated February 10, 2015 from Amtrak Counsel to CN Counsel reviewing the other discovery issues that remain outstanding. See Letter attached to Exhibit A. As a follow up to that letter, Amtrak Counsel sent a letter to CN Counsel dated February 27, 2015 (see Exhibit B) discussing the remaining discovery productions that Amtrak planned to make. The letter outlines Amtrak's supplementation of Amtrak's prior productions, which was made today, Friday, March 6, 2015. The letter also indicates that, with the supplemental production provided today, Amtrak has concluded the production that it has been ordered to make by the Board or that it had an obligation to produce within the reasonable bounds of what it agreed to produce.

If you have any questions, please feel free to contact me.

Respectfully submitted,



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

Enclosures

EXHIBIT A



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VIA E-FILING

February 10, 2015

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

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

Dear Ms. Brown:

This letter is in response to the Surface Transportation Board (“STB” or “Board”) Decision served February 3, 2015 in the above referenced proceeding. *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) – Canadian National Railway Company*, FD 35743 (STB served Feb. 3, 2015). The Board asked that National Railroad Passenger Corporation (“Amtrak”) and Canadian National Railway Company (“CN”) “inform the Board of the extent to which discovery regarding the issues raised in CN’s third motion to compel has progressed since Amtrak’s December 10 reply.” Slip op. at 2. The Board also ordered CN to “indicate how, in light of any such progress, CN requests that the Board proceed with the pending motion.” *Id.* Amtrak’s response to the Board’s request for an update on the discovery process is set forth in the paragraphs that follow.

A. Amtrak’s Status Report Regarding CN’s Third Motion to Compel

CN’s Third Motion to Compel sought an order compelling Amtrak to “produce ridership and revenue database information pertaining to passenger services Amtrak operates on CN’s lines.” *Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests*, 1 (Dec. 2, 2014) (“*Third Motion to Compel*”). In Amtrak’s response to the Third Motion to Compel, Amtrak explained, “Amtrak has already provided CN with significant relevant ridership and revenue data, and has objected on the grounds of breadth and relevance to producing anything more. Nevertheless, despite its objection to CN’s request, in the interest of moving the case forward, Amtrak is willing to produce substantially all of the additional information CN has requested in its Third Motion to Compel, which is narrowed from earlier requests to which Amtrak objected.” *National Railroad Passenger Corporation’s Reply to Third Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Discovery Requests*, 2 (Dec. 10, 2014).

Specifically, Amtrak agreed to provide “in native format, the ridership and revenue fields of its database identified by Amtrak in Exhibit 3 of the Third Motion to Compel for the services it runs (in whole or in part) on CN lines within the agreed-upon discovery range (May 1, 2011, to October 31, 2013), excluding any individual ticket pricing data. . .” *Id.* at 7-8. Amtrak has produced ridership and revenue data for the Amtrak lines that run on CN’s lines for the relevant time period. Amtrak has withheld three fields that would disclose pricing and ticket-specific revenue, as per Amtrak’s objections to CN’s Requests for Production 16 and 17 (ridership and revenue data), and Request for Production 18 (pricing data).¹ Amtrak has designated the data that it has produced as “Highly Confidential” because of its proprietary and commercially sensitive nature. This production is consistent with what Amtrak offered to produce in its reply to CN’s Third Motion to Compel. *See Id.* at 7-8.

B. Status of Discovery Pursuant to the Board’s September 23, 2014 Decision

In order to further assist the Board, Amtrak is also providing a status report regarding the Board’s September 23, 2014 decision on the operating agreements and CN’s Second Motion to Compel. Attached as Exhibit 3 is a letter that Amtrak has sent to CN’s outside counsel summarizing where we are on discovery matters. Amtrak has produced all the operating agreements the Board has directed, and it is preparing its production related to delay coding documents also in accordance with the Board’s decision. The attached letter to CN’s Counsel also addresses certain other discovery matters that CN has raised and to which we believe we have satisfactorily responded in accordance with our answers to CN’s requests for documents and interrogatories.

Respectfully submitted,



Linda J. Morgan
Attorney for National Railroad Passenger
Corporation

Enclosures

¹ Exhibit 1 is [REDACTED]. Exhibit 2 is a copy of CN’s Requests for Production 16, 17 and 18 with Amtrak’s Responses.



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February 10, 2015

David A. Hirsh, Esq.
Harkins Cunningham LLP
1700 K Street, N.W.
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Washington, DC 20006-3804

*Re: STB Finance Docket 35743 - Application of the National Railroad
Passenger Corporation under 49 U.S.C. § 24308(a)*

Dear David,

This letter reviews where we stand with respect to discovery in this case. CN and Amtrak have met a number of times since the STB's September 23, 2014 decision and Amtrak has produced a large volume of documents in addition to what it had already produced. Following up on our meet and confer on December 18, 2014, Amtrak is preparing productions related to delay reporting to comply with the September 23rd decision. With respect to previous productions, Amtrak has supplemented them in response to CN's requests insofar as CN's requests have been within the scope of what we agreed to produce in our responses to CN discovery requests and Board orders. During our meetings, CN has made numerous additional requests not encompassed in the Board's September 23rd decision that are duplicative, unduly burdensome, and/or outside the scope of our agreed upon discovery. To clarify Amtrak's position with respect to these requests, we summarize below what Amtrak has produced and what further it intends to produce.

1. Operating Agreements

Amtrak has made several productions of operating agreements to comply with the Board's April 15, 2014, and September 23, 2014 decisions. CN indicates that it believes there are additional amendments to these agreements, in particular for agreements with Conrail and Buckingham Branch. Amtrak has completed an extensive search to identify additional amendments to all the agreements and has produced those additional materials. CN now has all the documents within this category that Amtrak has been able to locate.

2. Ridership and Revenue Data

Pursuant to Amtrak's Reply to CN's Third Motion to Compel, filed December 10, 2014, Amtrak has produced ridership and revenue data for the Amtrak trains that run on CN's lines. As discussed during our December 18 meet and confer, Amtrak has withheld three fields that would disclose pricing and ticket-specific revenue, as per Amtrak's objections to CN's Requests for Production 16 and 17 (ridership and revenue data), and Request for Production 18 (pricing data). Amtrak has designated the data that it has produced as "Highly Confidential" because of its proprietary and commercially sensitive nature. In your email of February 2, 2015, you complain about the lack of revenue information in what Amtrak has produced. However, Amtrak has produced exactly the data for the relevant time period that it said it would produce in its Reply and as discussed in our follow up meet and confer. Related to this production, you have also asked for the definition of certain codes, which we will be producing forthwith.

3. Delay Reporting Documents

As already mentioned, Amtrak is preparing productions to comply with the Board's September 23, 2014 decision, based on the custodians and search terms agreed upon by CN and Amtrak and also based upon our discussions of specific data sources, including TDRS (Transportation Department Review System).

4. Email Attachments

Amtrak has produced several thousand email attachments that were initially withheld as non-responsive from its previous productions. At CN's request and at Amtrak's expense, Amtrak re-reviewed and produced the approximately 3,000 previously withheld attachments. CN has now identified a small number of additional as yet unproduced attachments that they believe to be responsive. Amtrak is preparing these documents for production to the extent that they are responsive as it did with the other previously unproduced attachments.

5. Stubbed Attachments

As discussed during our December 18 meet and confer, the email stubs that are part of Amtrak's production are the result of a data migration process that was underway within Amtrak at the time of the collection. Amtrak has confirmed that it has not lost any of these documents, but re-collecting them individually or performing a large-scale re-collection for purposes of producing these 147 documents is unduly burdensome. The former would be time and resource intensive for Amtrak personnel, and the latter would incur substantial processing costs to re-process large amounts of data a second time. When we discussed this issue, you agreed to review the list of stubbed attachments to identify files you would like produced. In your email dated January 21, 2015, you asked that we produce all 147 of them. As discussed above, this would require a substantial effort by Amtrak to produce a relatively small number of

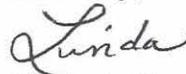
documents. Amtrak does not intend to produce the balance of these documents as a result.

6. Other Documents and Data Sources

As summarized in your email from February 2, 2015, CN has continuously made new requests for additional production of documents and from data sources. These include documents related to the "host railroad issue log," Amtrak's Intranet, a policy and procedures manual, notes from several meetings, business plans, monthly performance reports, and operating forecasts. Amtrak views any further production on these topics as duplicative and burdensome. In connection with Amtrak's earlier productions, Amtrak will not pursue any further production on these topics. Amtrak and CN agreed upon a list of custodians and searches to be run against those custodians' documents, and Amtrak has produced the results of those searches. In addition, Amtrak has supplemented its productions at CN's request and at Amtrak's expense, as discussed in the foregoing sections.

In summary, Amtrak's intent is to comply with its discovery obligations in this proceeding and to move the matter forward to resolution. Amtrak has sought to cooperate with CN by supplementing its productions and investigating questions as they arise, but your most recent requests for additional supplemental productions suggest that you view Amtrak's duty as an open-ended commitment to be extended *ad infinitum* with serial supplemental requests. Amtrak does not view its discovery obligations this way. Amtrak will complete its productions as outlined above.

Sincerely,



Linda J. Morgan

Attorney for National Railroad Passenger Corporation

EXHIBIT B



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February 27, 2015

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Re: STB Finance Docket 35743 - Application of the National Railroad Passenger Corporation under 49 U.S.C § 24308(a)

Dear David:

This letter is in response to your letter from last Saturday evening (February 21, 2015) and follows up on our letter of February 10, 2015.

I. Supplementation of Amtrak's Prior Productions

As we stated in our February 10th letter, Amtrak has supplemented its previous productions in response to issues identified by CN, including those issues related to missing email attachments, stubbed email attachments, and additional documents that we agreed or were ordered to produce. Amtrak recognizes its duty with respect to these productions and intends to complete these supplemental productions by Friday, March 6, 2015. The outstanding productions include the following:

- Amtrak has identified the remaining unproduced email attachments (the 34 documents referenced in your letter of February 21) and will produce these documents to the extent they are responsive.
- Amtrak will produce the 147 stubbed attachment documents to the extent that they are responsive. Amtrak has undertaken the substantial effort described in our February 10th letter required to restore these messages.
- Amtrak will produce the additional code definitions for the ridership and revenue database requested by CN.
- Amtrak will produce the Monthly Performance Reports for December 2011, December 2012, and October 2013.
- Amtrak will produce its final Comprehensive Business Plan documents for 2011, 2012, and 2013.



II. Amtrak's Production of Documents in Response to the Board's January 23 Order

Today, Amtrak is producing approximately 10,000 documents to CN in response to the Board's order with respect to delay coding/reporting documents. Included in this production is a report from the TDRS system that contains all the data in TDRS that relates to delay coding within the discovery period. Between the TDRS data and the custodial email produced contemporaneously with this letter, and CN's existing access to the OTP database – which CN has had prior to and throughout the discovery period -- CN has the information responsive to its requests as modified in the Board's order of January 23. Amtrak's production is complete with respect to this subject matter.

III. Other Requests

As we stated in our February 10 letter, CN has continued to request that Amtrak produce additional documents outside the scope of agreed upon discovery for this case. It is clear from your continuing requests for the production of additional documents and data sources that you view Amtrak's discovery obligation as an unending duty to continuously search for, collect, review and produce every document that can possibly be identified, regardless of whether it is encompassed by the document requests and the scope of the Joint Discovery Protocol. The very purpose of reaching agreement on custodians and keywords is to narrow the scope of productions to a reasonable volume, enabling discovery without imposing undue burden and cost on the parties.

You state in your letter that Amtrak is obligated to produce documents beyond the list of custodians and search terms that have been agreed upon. Although we disagree with that interpretation of the Joint Discovery Protocol, Amtrak has in fact produced additional documents requested by you, as evidenced in this letter and our previous supplemental productions. Amtrak has also cooperated with you in an effort to establish reasonable boundaries on the scope of discovery, including the discussion of data sources, identifying custodians, and reaching agreement on search terms and the Joint Discovery Protocol. Your view that all of that was merely the opening phase of an endless supplementation process is simply without merit.

Amtrak will supplement its previous productions and complete its current productions as described above.

Sincerely,

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

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