



ATTORNEYS AT LAW

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

Justin J. Marks
D 202.887.1412
jmarks@nossaman.com

239563

VIA E-FILING

November 17, 2015

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

ENTERED
Office of Proceedings
November 17, 2015
Part of
Public Record

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

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the Reply of the National Railroad Passenger Corporation ("Amtrak") to the CN Motion to Remove the Confidentiality Designation for Portions of Amtrak's Opening Submission. Amtrak's Reply and the accompanying exhibits are filed under seal and marked confidential.

Additionally, please find a redacted public version of Amtrak's Reply.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Justin J. Marks'.

Justin J. Marks
Attorney for National Railroad Passenger Corporation

cc: David A. Hirsh

Enclosures

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

**AMTRAK'S REPLY TO CN MOTION TO REMOVE THE
CONFIDENTIALITY DESIGNATION FOR PORTIONS
OF AMTRAK'S OPENING SUBMISSION**

Kevin M. Sheys
Reed W. Neuman
Justin J. Marks
Puja Bhatia
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: November 17, 2015

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

**AMTRAK’S REPLY TO CN MOTION TO REMOVE THE
CONFIDENTIALITY DESIGNATION FOR PORTIONS
OF AMTRAK’S OPENING SUBMISSION**

The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, hereby replies in opposition to the Motion of the Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively referred to herein as “CN”) to Remove the Confidentiality Designation for Portions of Amtrak’s Opening Submission (“CN Motion”).

BACKGROUND

On December 16, 2013, the Board adopted a Protective Order to govern the treatment of Confidential and Highly Confidential materials to be offered in discovery and in evidentiary submissions. Under the Protective Order any party of record that determines in good faith that the information it will file or produce is confidential is therefore permitted to designate that information as Confidential or Highly Confidential. Protective Order ¶¶ 2-3. Confidential Information “means confidential freight traffic data, confidential financial and cost information, confidential personnel information, confidential agreements, and other confidential or proprietary information.” Id. at ¶ 1(c). A designation of Confidential means that the information is

available only to employees, counsel, consultants, or agents of a party to these proceedings. Protective Order ¶ 5. Board-ordered protective orders frequently use identical or substantially similar provisions.

On September 4, 2015, Amtrak submitted its Opening Submission (“Opening Submission”) in this proceeding. On September 8, 2015, Amtrak submitted a public version of its Opening Submission. On September 24, 2015, CN informed Amtrak that it believed certain information designated as Confidential in Amtrak’s public version should be designated as public; the parties confidentially discussed CN’s assertion. CN Motion at 7. On October 28, 2015, CN notified Amtrak that it intended to file a motion to remove the confidentiality designation on items it believed should be made public and Amtrak advised CN that it intended to file a revised public version of its Opening Submission redesignating certain information as public. Later that day, CN submitted the CN Motion and the next day (October 29, 2015) Amtrak submitted a revised public version of its Opening Submission.

Amtrak’s revised public version substantially reduced the number of Confidentially-designated items in dispute. CN’s Motion identifies additional items, including many that Amtrak had designated as Confidential based on the reasonable assumption that CN would want them treated as such, on which Amtrak has no objection to a redesignation as public. However, there are three items still in dispute. With respect to these three items, CN has not demonstrated that Amtrak’s Confidential designation is improper under the Protective Order and therefore Amtrak respectfully submits that the CN Motion should be denied.

ARGUMENT

There are three items redacted in Amtrak's revised public version that remain in dispute:¹

- The [REDACTED] threshold for penalties and the [REDACTED] threshold for incentive payments in the 2011 Operating Agreement; and
- The maximum penalty amount in Amtrak's proposed terms and compensation; and
- The maximum quality payment amount in Amtrak's proposed terms and compensation.

The Board resolves any doubts as to the need for confidentiality in favor of protecting the asserted confidentiality unless the opposing party can show that the removal of the designation is necessary for it to make its case, to argue an appeal adequately, or to satisfy a statutory goal. *The Central Illinois Railroad Co. – Lease and Operation Exemption – Lines of the Burlington Northern and Santa Fe Railway Co. at Chicago, Cook County, IL* STB Finance Docket No. 33960, slip op at 1-2 (STB served Mar. 2, 2001); *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388 (STB served Feb. 23, 1998).²

CN has not met its burden with respect to any of the three items in dispute.

¹ The redactions related to the items in dispute are highlighted in red on Exhibits A, B, and C of this Reply. All other redacted material is highlighted in green. The public version of this Reply does not include Exhibits A, B, and C. However, following the Board's decision on the CN Motion, Amtrak will file a revised public version of its Opening Submission.

² In cases involving the validity of a Highly Confidential designation, the Board sometimes has required the designating party to justify the Highly Confidential designation. *Total Petrochemicals. USA, Inc. v. CSX Transp., Inc.* No. NOR 42121, 2011 STB Lexis 341, *8 (STB served July 15, 2011); *Central Oregon & Pacific R.R., Inc. – Abandonment & Discontinuance of Service – in Coos, Douglas & Lane Counties, Or.*, No. AB-515 (Sub-No. 2), slip op. at 4-5 (STB served Aug. 15, 2008). CN's reliance on these cases (see CN Motion at 11) is misplaced because the present dispute does not involve the validity of a Highly Confidential designation.

Obviously, CN cannot argue that redesignation is necessary for CN to make its case, because any CN employee who agrees to comply with the Protective Order can see all information regarding the three Confidential items in dispute. CN does not argue that CN could not adequately argue an appeal without public disclosure of the three disputed items. It is inconceivable that CN could not adequately argue an appeal without disclosure of the three items. Finally, none of the broad statutory arguments CN makes in the Motion apply to the three disputed items.

The foregoing is dispositive of the CN Motion. However, all three of the disputed items are well-within the definition of Confidential information under the Protective Order.

CN objects to the Confidential designation of the thresholds that determine incentive and penalty payments in the 2011 Operating Agreement. Under the 2011 Operating Agreement, penalties begin at [REDACTED] contract on-time performance and incentives begin at [REDACTED] contract on-time performance. The incentive and penalty thresholds in the 2011 Agreement determine the amount of incentives or penalties CN pays under the 2011 Agreement. Thus, they are “financial” information expressly within the definition of Confidential information in the Protective Order.

Moreover, the Board ruled in this proceeding that operating agreements between other host railroads and Amtrak are Highly Confidential. *Application of the National Railroad Passenger Corp. under 49 U.S.C. § 24308(a) – Canadian National Railway Company*, STB Finance Docket 35743, slip op at 6-7 (STB served Apr. 15, 2014). In its opening submission, CN designated the entire 2011 Operating Agreement as Highly

Confidential.³ Amtrak designated the entire 2011 Operating Agreement as Confidential and CN does not object to that designation. The fact that (1) the operating agreements between other host railroads and Amtrak are Highly Confidential, (2) CN designated the 2011 Operating Agreement as Highly Confidential, and (3) Amtrak designated the 2011 Operating Agreement as Confidential without CN objection lend further support to Amtrak's position that the penalty and incentive thresholds should also be treated as Confidential under the Protective Order.

CN objects to the Confidential designation of the maximum penalty amount in Amtrak's proposed terms and compensation. As explained in Amtrak's Opening Submission, Amtrak proposes that the maximum penalty CN would pay be set on a per route basis at the point where CN perceives no additional costs from reduction in the quality of service. See Amtrak Opening Statement at 15.

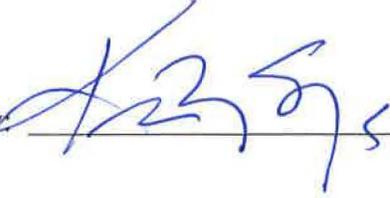
The proposed maximum penalty amount is "financial information" expressly within the definition of Confidential information in the Protective Order. Amtrak wants to have the flexibility to negotiate different maximum penalty amounts in other host railroad agreements and Amtrak would be prejudiced if the proposed maximum penalty amounts were publically disclosed in this proceeding. Moreover, if the Board adopts Amtrak's proposed terms and compensation, the maximum penalty amounts would become part of the new operating agreement between CN and Amtrak. As noted above the terms of Amtrak-host operating agreements are entitled to Confidential or even Highly Confidential treatment under the Protective Order.

³ In CN's Opening Evidence, CN also redacted reference to the [REDACTED] threshold for penalties and [REDACTED] threshold for incentive payments, but it now without any justification, seeks to make that reference Public. Verified Statement of Paul E. Ladue and Scott Kuxmann at 14, 17-18.

For the same reason, the maximum quality payments in Amtrak's proposed terms and compensation should remain Confidential. The proposed maximum quality payment amounts are "financial information" expressly within the definition of Confidential information in the Protective Order. Amtrak wants to have the flexibility to negotiate different maximum quality payment amounts in other host railroad agreements and Amtrak would be prejudiced if the maximum quality payment amounts proposed in this proceeding were publically disclosed. Moreover, if the Board adopts Amtrak's proposed terms and compensation, the maximum quality payment amounts would become part of the new operating agreement between CN and Amtrak and the terms of Amtrak-host operating agreements are entitled to Confidential or Highly Confidential treatment under the Protective Order.

For the foregoing reasons, Amtrak respectfully requests that the Board deny the CN Motion.

Respectfully submitted,

By:  _____

Kevin M. Sheys
Reed W. Neuman
Justin J. Marks
Puja Bhatia
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for National Railroad Passenger Corporation

William H. Herrmann
Christine E. Lanzon
National Railroad Passenger Corporation
60 Massachusetts Avenue, NE
Washington, DC 20002

Dated: November 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 17, I served a copy of the foregoing upon Canadian National Railway Company and the other parties on the service list in Finance Docket No. 35743.



Justin J. Marks

Counsel for National Railroad Passenger Corporation