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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: *Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a) – Canadian National Railway Company (Docket No. FD 35743)*

Dear Ms. Brown:

This responds to Amtrak's letter to the Board of March 6, 2015, which asserts (at page 1) that "Amtrak has taken the specific actions directed by the Board and that the discovery production to CN is complete."

Unfortunately, discovery is not complete. As the Board knows, on December 2, 2014, CN filed a motion to compel Amtrak to produce ridership and revenue data. Amtrak responded to that motion on December 10, 2014, stating that it would produce ridership and revenue data by December 23, 2014. However, Amtrak failed to do so. Instead, long after December 23, Amtrak produced ridership data, but failed to produce any revenue data in response to CN's motion. Therefore, as reflected in the parties' Board-ordered status reports on February 10, 2015, CN's third motion to compel is still very much at issue, and awaiting the Board's decision. In CN's view, as expressed in its motion papers and status report, Amtrak's document production remains materially incomplete. Amtrak has refused to produce revenue data that were clearly requested in CN's October 31, 2013 discovery requests, that are central to the value of the CN services to Amtrak that are the subject of this proceeding, that Amtrak admits to possessing in a readily accessible database, and that are not privileged. CN respectfully submits that discovery cannot be deemed to have ended before CN's motion, which was timely filed over three months ago, is resolved and any production ordered pursuant thereto is completed.

There are also questions whether Amtrak's non-revenue-data document production is complete – both as to whether Amtrak has in fact complied with the specific instructions in the

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Board's September 23 order, and whether it has finally met the various other discovery obligations on which it has long dragged its heels, as detailed in CN's February 3, 2015 email to Amtrak (Attachment 2 to CN's February 10, 2015 status update on CN's third motion to compel) and CN's February 21, 2015 letter to Amtrak (attached hereto as Exhibit A).¹ CN and the Board should have the opportunity to verify Amtrak's self-serving claim that it has done all that it needs to, particularly since Amtrak made exactly the same claim back on September 22, 2014, and that claim has since been shown to be false in multiple respects, as evidenced by the substantial additional material it has subsequently been required to produce.

CN received Amtrak's most recent document production on the afternoon of Friday, March 6. One week prior, CN received in one lump approximately 10,000 documents that Amtrak has represented as the entirety of what it intends to produce in response to the Board's September 23, 2014 decision (*i.e.*, Amtrak took over five months to purport to comply with the Board's order, and made no rolling production of its responsive documents during that time). CN is currently reviewing these recent productions. If CN concludes that there are still potentially significant omissions, CN will alert Amtrak and the Board and, if necessary, file any further motion to compel, within one week. If CN concludes that there are omissions but that they are not significant, CN will not trouble the Board further.

CN does not wish to see this proceeding unnecessarily delayed – CN derives no advantage or benefit from delay – but CN believes that this proceeding should move ahead with the benefit of complete discovery so that the Board can reach fully informed decisions. Amtrak had the benefit of CN's complete discovery in early September 2014, but, six months later, CN's request to Amtrak for revenue data, at least, remains outstanding. In order to ensure a fair and fully informed process, before CN is required to proceed with its opening submission, CN's third motion to compel should be resolved, and CN should be permitted until Monday, March 16 to determine whether the other remaining omissions in Amtrak's document production are

¹ It is telling that Amtrak failed to attach CN's February 21, 2015 letter to its March 6, 2015 notice, despite attaching its own preceding and response letters. As the February 21 letter details, Amtrak has not only failed without good reason to produce several categories of documents that are plainly responsive and relevant; it repeatedly promised to search for or produce documents, with the effect of dissuading CN from filing a motion to compel, and then, after weeks of delays, reneged on its promises.

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significant enough to warrant a further motion to compel. As the Board ordered on September 23, submissions should proceed after “Discovery End” – not when Amtrak unilaterally says so.

Very truly yours,



David A. Hirsh

Counsel for Illinois Central Railroad Company and
Grand Trunk Western Railroad Company

Attachment

cc: Linda J. Morgan, Esquire
William H. Herrmann, Esquire

Exhibit A

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February 21, 2015

Linda J. Morgan, Esquire
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, D.C. 20006

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

Dear Linda:

This responds to your February 10 letter and asks that you clarify Amtrak's position on several important outstanding discovery items you had previously undertaken to investigate and/or produce.¹

We were disappointed by Amtrak's abrupt departure from the prior cooperative way the parties had been working to address discovery issues, and by your delay in responding to our February 3 letter until 3 pm on February 10 – just 2 hours before the Board's deadline for reports on the status of Amtrak's long-overdue production from its ridership and revenue database.

As we detail below, during months of discussions between counsel, you have made multiple commitments to us to search for and produce various documents and information. You committed to produce revenue data; you committed to provide specific information about the contents of the TDRS database; you committed to produce all attachments to responsive emails; you committed to produce stubbed attachments; and you committed to search for and, if found, produce several other regularly maintained reports or business records we identified as responsive and potentially significant based on our review of Amtrak's document production so

¹ This letter focuses on the most significant of Amtrak's ongoing failures to meet its discovery obligations (with the exception of its withholding of revenue database information relating to services operated over CN lines, addressed in our February 10 status report and related motion to compel). As you are aware, we have addressed several other issues in our meet-and-confers. CN expects Amtrak to comply fully with its discovery obligations, and does not waive any rights insofar as it does not repeat here points already discussed between the parties.

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far. Your February 10 letter appears to retract many of those commitments. We urge you to reconsider.

Amtrak's abrupt and inexplicable reversal of position now threatens to further delay this proceeding, which has already been excessively delayed by Amtrak's deficient initial production and repeated delays. It is now more than 15 months after CN served its requests, almost five months after Amtrak incorrectly informed the Board its production was complete, and almost five months after the Board's September 23 order granting a CN motion to compel. Nonetheless, as you concede in your letter, Amtrak has not completed its document production and it is now backtracking on essential commitments it made to complete its production. To minimize further delays, we ask that you provide clear and definitive responses to this letter as soon as possible, but no later than February 27.

Delay Reporting Documents / TDRS

At our December 18 meet and confer, both parties recognized that the documents regarding delay reporting that Amtrak has yet to produce pursuant to the Board's September 23 order should include, but not be limited to, data from Amtrak's TDRS (Transportation Department Review System). Pursuant to Section 3 of the Joint Discovery Protocol, you had undertaken in November to investigate and provide specific information relating to Amtrak's TDRS to enable the parties to determine (i) what would be produced from TDRS in response to the Board's September 23 order and (ii) whether Amtrak would need to supplement its production from TDRS with information from other central repositories.² Given your report on December 18 that you were still investigating these matters, we had hoped to receive this information at the January 30 meet and confer, but you cancelled that conference. Your February 10 letter vaguely references possible production from the TDRS but does not explain what Amtrak intends to produce from it and what supplementation might be required from other sources, and does not provide the background information necessary for CN to consider those issues. ***Please do so.***

Email Attachments

Your description of the circumstances relating to Amtrak's production of "several thousand email attachments that were initially withheld as non-responsive ... [a]t CN's request and at Amtrak's expense" (Feb. 10 letter, Point 4) omits the critical fact that Amtrak's failure to include the attachments in its initial production was, as you recognized during our meet-and-confers, Amtrak's mistake. Amtrak was therefore merely rectifying its own error.

² The specific information we discussed and that Amtrak agreed to provide is listed in my February 3 letter: (i) whether, when an incorrect coding issue is discovered and a code change is made, a TDRS field shows what the change is; and if not, (ii) identification of the depository (in TDRS or elsewhere) that contains this information.

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Point 4 in your letter states that “CN has now identified a small number of additional as yet unproduced attachments that they believe to be responsive,” and you state that “Amtrak is preparing these documents for production to the extent that they are responsive as it did with the other previously unproduced attachments.” We do not understand the underlined portion of your concluding sentence. As we have discussed before, and consistent with conventional practice, if an email is responsive, it should be produced in full, including its attachments. ***Please tell us if you will produce the missing attachments (which we believe number 34) in full.***

“Stubbed Attachments”

In November you told us you believed the so-called “stubbed attachments” shown as family members of various emails produced by Amtrak, but that could not be accessed in the files we received, were email extenders that had been archived and were no longer reasonably accessible. You agreed to investigate their location, lack of accessibility, and timing and to provide us with a report. Graham then reported at the December 18 session that these documents were intact and available, acknowledged their relevance, and assured that we would get what we needed. We agreed that you would send us a list and that, based on that list, we would notify you of the documents Amtrak should produce. We received the list on January 20 and responded on January 21 that

given their relevance and relatively small volume (147 documents), and our understanding from the last meet and confer that these documents have been restored, it seems most efficient if Amtrak simply produces all 147 of the stubs. Please confirm that you will do so. We can discuss further on next week’s call if necessary.

However, Amtrak then cancelled that call, and we received no response to our January 21 email until your February 10 letter stating that Amtrak does not intend to produce any of the 147 documents due to the “substantial effort” that would be required.

Amtrak’s position that it will not produce any of the 147 documents is unacceptable. These documents are responsive to document requests propounded in October 2013, and Amtrak – not CN – bears responsibility for the fact that they were mistakenly separated from their parent emails as “the result of a data migration process that was underway within Amtrak at the time of the collection” (Feb. 10 letter, Point 5) – a point in time when Amtrak was obliged to preserve and gather its documents so that it could meet its discovery obligations in this proceeding.

Amtrak’s post-complaint, post-request mishandling of the document collection does not excuse Amtrak from producing any of these relevant, responsive documents. Amtrak had an obligation to preserve and produce all 147 of them. Moreover, a number of those documents appear to be particularly significant regarding key issues in the case. We are willing to permit Amtrak to exclude those attachments that reflect or constitute documents sent to or received from

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CN (e.g., CDRs, executed copies of agreements). ***Please tell us if you will produce all other attachments.***

Other Documents and Data Sources

Your statement that “CN has continuously made new requests for additional production of documents and from data sources” and your related characterization of my February 3 email are inaccurate and misleading. CN has served no new discovery requests since its October 2013 discovery requests. Amtrak has failed to comply with those initial requests, and with the Board’s orders granting CN’s motions to compel, in multiple respects. What you call “new requests” are CN’s identification of various specific aspects of Amtrak’s failures to comply. Moreover, CN identified those deficiencies by late 2014, and you previously committed to remediate them.³

Host Railroad Issue Log. You agreed back in November to locate this log (referenced in ATK0000126036) and advise us of its contents and whether Amtrak would voluntarily produce it. Graham reported at our December 18 conference that the log was not part of TDRS and that his investigation was continuing. ***Please tell us if you will produce this log or, if you believe it is non-responsive, explain why.***

Policy and Procedures Manual. You stated at the December discovery conference that you thought the specific Policy and Procedures Manual referenced in ATK0000126036 had been produced. However, we cannot find it in Amtrak’s document production and you have not identified it in that production. ***Please identify its Bates number or produce this document.***

Operating Forecast. At the December discovery conference, Graham reported that the operating forecast referenced in ATK0000215625 had been inadvertently omitted from Amtrak’s last production and would be included with the production made pursuant to the Board’s September 23 Order. ***Please confirm that it will be included in that production.***

³ On page 3 of your February 10 letter you state that (apart from the outstanding delay reporting document production) Amtrak has produced the results of the searches it said it would run for the custodians it had identified. However, the parties committed to do more than that. Under the Joint Discovery Protocol, the “initial lists of custodians” do not exhaust the parties’ discovery duties, *see* ¶ 1(c), and production is also required from corporate databases, *see* ¶ 3(e). Custodian lists are useful to delineate a reasonable scope for electronic term searches, but specifically identified documents and business records that are relevant and responsive must be produced insofar as they are reasonably accessible, without regard to the identity of their individual custodian. CN has produced relevant and responsive documents to Amtrak without limiting its production to named custodians’ files. As chronicled above, you had committed to do likewise to find the specific documents and business records listed herein.

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Business plans. Amtrak has produced various versions of a Business Plan from FY2008, and excerpts of a later draft Business Plan from FY2013, in response to CN discovery requests. At our December conference we asked whether Amtrak has updated its Business Plan since FY2008 and requested that any updates be produced. You agreed to check. ***Please tell us if you will do so.***

Monthly Performance Reports. Amtrak produced only two of these reports, from July 2012 and April 2013, for the pertinent discovery period (May 2011 through October 2013), in response to CN's discovery requests. We advised you in December that we are willing to forgo production of all 30 monthly reports if you agree to produce the December 2011, December 2012 and October 2013 reports. It cannot possibly be burdensome to produce these reports, which Amtrak generates (and presumably maintains) in the regular course of business. ***Please tell us if you will do so.***

Other Specific Business Records. At the December meet and confer, we advised you that we had discovered references in various Amtrak documents to three intranet records that appear to be responsive to CN's discovery requests but were not produced: the "Delay Analysis" and "Delays Between Stations" reports referenced in ATK0000060147; and the "Dockets" referenced in ATK0000046815 and ATK0000190758, which appear to be generated on a quarterly basis and contain relevant, responsive information regarding schedules and operational issues concerning Amtrak services that run over CN lines. It should not be unduly burdensome to produce these centrally-maintained records, which fall squarely within the scope of CN's document requests. ***Please tell us if you will do so.***

* * *

To conclude, Amtrak has been required to supplement its productions "at Amtrak's expense" because of mistakes, errors, and omissions in its original productions. Those admitted Amtrak discovery deficiencies have also caused significant expense to CN, by necessitating a series of meet and confers, correspondence, and motions to compel, and they have delayed this proceeding for many months. It is long overdue for Amtrak to fully comply with its obligations. Please respond by February 27.

Sincerely,



David A. Hirsh

cc: Graham Rollins

CERTIFICATE OF SERVICE

I certify that I have this 9th day of March, 2015, caused a true copy of the foregoing Letter Response to Amtrak's Letter to the Board to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Spencer R. Leroux