

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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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**NATIONAL RAILROAD PASSENGER CORPORATION'S REPLY IN  
OPPOSITION TO MOTION TO COMPEL RESPONSES TO REQUESTS FOR  
PRODUCTION BY THE ILLINOIS CENTRAL RAILROAD COMPANY AND GRAND  
TRUNK WESTERN RAILROAD COMPANY**

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The National Railroad Passenger Corporation (“Amtrak”), through undersigned counsel, respectfully opposes the motion to compel responses to Requests for Production 5 and 6 by the Illinois Central Railroad Company (“IC”) and the Grand Trunk Western Railroad Company (“GTW”) (together and hereinafter referred to as “CN”).

**INTRODUCTION**

On February 12, 2014, CN filed a motion in the above-referenced proceeding, asking the Board to compel Amtrak to produce the documents requested in CN’s Requests for Production of Documents Nos. 5 and 6, seeking all Amtrak’s operating agreements in their entirety with respect to (1) other railroads that host regular Amtrak service,<sup>1</sup> and (2) passenger rail service providers that Amtrak itself hosts on lines it owns or controls. The operating agreements that are

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<sup>1</sup> There are 24.18 million miles of track hosted by the Class I railroads on which Amtrak operates. CN hosts 1.46 million miles, or 6% of the hosted track. CN is seeking other operating agreements, including those that Amtrak has with Union Pacific Railroad, BNSF Railway, CSX Transportation, Norfolk Southern Railway and Canadian Pacific Railway, which together maintain the remaining 94% (22.72 million miles) of the track hosted by the Class I railroads.

the subject of CN's motion to compel are privately negotiated contracts which contain commercially sensitive and proprietary information that should only be discoverable if relevant or might lead to the discovery of relevant evidence. CN's motion to compel far exceeds what could be found relevant, and Amtrak's proposed alternative as embodied in its letter to CN dated January 31, 2014<sup>2</sup> is intended to appropriately focus what is discoverable on what is truly relevant to the issues in the case.

## ARGUMENT

### **I. The Proprietary Nature of the Financial Terms of the Operating Agreements at Issue Deserves Protection.**

CN seeks all the operating agreements that set forth the terms of access provided to Amtrak by 19 other hosts, including other Class I railroads. CN also seeks all the operating agreements that set forth the terms of access provided by Amtrak to other passenger service providers, in particular commuter authorities operating on the Northeast Corridor.

As the Board is aware, operating agreements are tailored agreements negotiated by Amtrak with each of its hosts and with the entities it hosts. The various operating agreements cover a broad array of commercial issues between the parties to each agreement and thus are lengthy with multiple appendices. As to form, there are certain similarities but each operating agreement is tailored to the entirety of the unique circumstances between Amtrak and the specific railroad or other entity involved in the negotiation regarding the terms and compensation for access.

As with any privately negotiated contract, these agreements contain commercially sensitive and proprietary information. Each operating agreement being sought by CN has specific provisions setting forth the price for access and the specific conditions associated with

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<sup>2</sup> This letter is attached to the filing as Exhibit 1.

the provision of access, negotiated to reflect the specific interests of the parties to the agreement. Nothing can be more commercially sensitive and proprietary than price or financial terms that reflect the particular business attributes of an entity. In its zeal to obtain all these contracts for its own business advantage, CN downplays the proprietary nature of these contracts, which is surprising given that it has many privately negotiated contracts that it surely would not want shared with others and certainly not with its rail freight competitors. Preserving the sanctity of privately negotiated contracts is certainly not a new concept to the Board, and in fact is a guiding principle that the Board has embraced in its decisions. With this principle in mind, Amtrak urges the Board in this case not to downplay the proprietary nature of contracts as CN has done.

CN suggests that Amtrak, in refusing to produce what CN seeks, is only protecting the third parties who are signatories to these contracts which CN argues Amtrak does not have standing to do. In accordance with its internal corporate policy, Amtrak does not disclose proprietary information unless it has the permission to do so. In fact, as CN knows, with respect to Class I host railroad agreements, Amtrak does not voluntarily release any information about the specifics of a particular agreement without the consent of the other party. The conduct of Amtrak in this proceeding should be no different.

But Amtrak is not just focused on the interests of third parties. It is also preserving its own proprietary interest, which it has the right to do. As Amtrak begins a new round of contract renegotiations with the Class I host railroads, it feels strongly that each new contract that results from this renegotiation phase should be specifically tailored to the relationship between the parties to the particular contract. This is an important objective that would be undermined if the upcoming renegotiations devolved into a process of cherry picking provisions for competitive

advantage from other contracts that are produced in discovery, particularly without a showing of relevance.

## **II. CN Has Not Met Its Burden To Show Relevance.**

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). The burden to show relevance is on the moving party. Whether a particular motion to compel should be granted is a factual determination by the Board. CN has failed to meet its burden based on the facts of this particular matter.

What is before the Board in this case is a dispute between Amtrak and CN concerning a specific operating agreement which only involves Amtrak and CN. It is not an agreement between Amtrak and any other entity. As previously described, the renegotiation of an access agreement with CN is at the front end of the next round of host railroad renegotiations particularly with the other Class I railroads. Amtrak is focused going forward on operating agreements that best fit the commercial relationship between Amtrak and another host railroad. The record developed in this proceeding before the Board and the justification for terms that are ultimately decided in connection with the Amtrak-CN operating agreement will be based solely on the current commercial relationship between CN and Amtrak and specific performance issues Amtrak has with CN. CN has failed to show how terms of past contracts negotiated years ago with other railroads are relevant to this new contract.

In its motion to compel, CN argues that, in order for the Board to determine what would be a reasonable commercial agreement in this matter, it should have access to what it characterizes as voluntary agreements reached in the marketplace to make that determination. CN’s argument mischaracterizes the situation. Host railroad operating agreements are negotiated

with 49 U.S.C. §24308 as a backdrop. And the marketplace in which the other parties operate is not relevant; what is relevant is the commercial relationship between these two parties, as affected by particular network configurations, track conditions, traffic densities, and services provided. The Board will be asked to determine, in accordance with the statute, what is reasonable as between the parties before it – namely Amtrak and CN – based on the record that parties develop through their submissions. The other operating agreements are not relevant to this process.

CN asks the Board to compel Amtrak to produce not only agreements that relate to other hosts but also agreements where Amtrak is the host to other passenger service providers, namely commuter authorities. These agreements involve operations on the Northeast Corridor and are not relevant to this proceeding. They have been negotiated subject to a different statutory requirement that does not limit compensation to incremental costs as does 49 U.S.C. §24308(a). Furthermore, under Section 212 of The Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Amtrak and other affected parties are obligated to determine an appropriate cost methodology for operations on the Northeast Corridor going forward. Clearly, agreements in place today covering passenger service evolved under an entirely different set of circumstances than the host railroad agreements and are set to evolve even further. Their relevance to the current dispute is not even tenuous at best.

In support of its motion, CN argues that Amtrak has effectively waived its right to oppose this motion because it voluntarily turned over other operating agreements in response to a

discovery request in a 1995 case involving Conrail.<sup>3</sup> That case arose under very different circumstances from those in which we find ourselves today.

After Amtrak was created in 1971, Amtrak entered into the same basic operating agreement with 20 host railroads, which was modified in 1974. Production of those individual agreements would not have created any unfair advantage. Starting in the mid-1990s, when the Conrail case was being pursued, Amtrak initiated a new round of contract renegotiations in light of all the changes that had taken place during the 25 years since the creation of Amtrak. It became clear that one size no longer fit all, and the next round of operating agreements reflected a more individualized approach.<sup>4</sup>

As discussed above, Amtrak is now engaged in a new, third round of negotiations, particularly with the Class I railroads, regarding operating agreements. Much has changed in the industry since the first basic operating agreement was entered into. Whether Amtrak voluntarily turned over operating agreements or discussed specific provisions in operating agreements in prior cases that date back 25 years should not bind it in its future negotiations nor serve to waive its right to question the relevance of other operating agreements to the current matter.

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<sup>3</sup> *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, 1995 ICC Lexis 338 (1995) (“*Conrail*”).

<sup>4</sup> In fact, in *Conrail*, the ICC in Footnote 37 of its decision stated unequivocally that the fact that a particular formula used to determine incremental costs may have been included in Amtrak’s other contracts “is of no consequence” in the case. *Conrail*, 1995 ICC Lexis at \*27. See also *Application of the National Railroad Passenger Corp. under 49 U.S.C. 24309(a) – Springfield Terminal Railway Company, Boston and Maine Corporation, and Portland Terminal Company*, 3 S.T.B. 157, 1998 WL 1799020, at \*5 (1998) (“*Guilford*”), in which the Board emphasized that what was adopted in the *Conrail* case in determining incremental cost is unrelated to how incremental cost would be determined in the *Guilford* case because of the difference between *Conrail*’s facilities and *Guilford*’s facilities.

### **III. A Protective Order Does Not Negate CN's Requirement to Show Relevance.**

CN argues that any concern about the proprietary or commercially sensitive nature of the operating agreements being requested can be addressed in accordance with the protective order applicable to the case. But the existence of a protective order does not sanction a fishing expedition – particularly where the information is so commercially sensitive. CN must still show relevance for all the terms and agreements being sought. And redaction, certainly not a new concept, would be the only way to protect information that would not be relevant and would otherwise give CN a commercial advantage over other host railroads.

CN goes out of its way in its motion to compel to question Amtrak's motives in resisting the broad discovery request that CN has made. It suggests that Amtrak is somehow pursuing a questionable strategy by "hiding behind claims of third-party confidentiality with respect to specific provisions or broader context when it may hurt its case" and "using its unsupported claims 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." Amtrak will not speculate in this pleading as to any ulterior motives that CN may have in pursuing their motion. Amtrak can state, however, that its concern about the sanctity of privately negotiated contracts and the interest in negotiating contracts that are specifically tailored to the commercial relationship between Amtrak and the other host railroad involved is no different from CN's interest, or any other party's interest, in preserving the proprietary nature of its own privately negotiated contracts and in being able to negotiate an agreement that is uniquely tailored to the relationship with the other party. The rules of discovery are not to be used to undermine that interest; rather they are there to ensure that the burden of relevance is met so that does not happen.

**IV. The Compromise Suggested by Amtrak Was a Serious Attempt to Address the Concern about Commercial Sensitivity and Relevance.**

On October 31, 2013, CN served its first set of Requests for Production and Amtrak responded to those requests on November 19, 2013. Thereafter, Amtrak asked CN to consider what it really was looking for in the operating agreements to see if there was a way to accommodate CN's request in some manner. CN's ultimate response, as described below, was that it wanted every single operating agreement that it was requesting, including for every one of its competitor railroads, and it wanted every one of those operating agreements in their entirety.

As previously discussed, allowing competitors and other parties access to the commercially sensitive information included in these agreements creates situations of unfair advantage. The production of all the operating agreements and all the terms will simply shift the focus from the appropriate terms and compensation based on the facts relevant only to CN and Amtrak to a comparison and cherry picking between specific portions of the other operating agreements to the competitive advantage of CN.

Even with these concerns in mind, Amtrak did not completely refuse to produce operating agreements. It indicated to CN a willingness to produce the other Class I host railroad agreements with selective commercially sensitive information redacted. Amtrak has attempted to see if there was a way to satisfy CN's demand and meet CN halfway, but CN dismissed Amtrak's proposal out of hand.

Instead of trying to constructively narrow the request to specific issues dealt with in the operating agreements, CN indicated that it could not possibly do this without seeing each one of Amtrak's operating agreements in accordance with its request. CN's demand is that it wants them all in their entirety. If CN had been willing to consider Amtrak's proposal more seriously, it may well have moved this discovery dispute closer to a resolution without Board intervention.

CN argues in its motion that Amtrak's compromise "fell far short of meeting Amtrak's discovery obligations." Amtrak sees its compromise quite differently. Any disclosure of operating agreements such as these must not be taken lightly and Amtrak is legitimately concerned about preserving the proprietary nature of these contracts. That said, Amtrak spent considerable time thinking about a reasonable alternative that would provide for the exchange of relevant terms and selective redaction of financial terms that are not relevant. CN argues that redaction in this case would not be appropriate. "Selective Redaction", the term used in the January 31, 2014 letter, is the only way to ensure that highly sensitive and proprietary information that is not relevant is not discoverable.<sup>5</sup>

Furthermore, these agreements are clearly the type of discoverable material that should be designated as highly confidential, and Amtrak's compromise proposal would provide for that. But CN dismissed the compromise out of hand, so is not in a position to judge what might have been the result of Amtrak's compromise.

### **CONCLUSION**

Amtrak urges the Board not to grant CN's motion to compel for the reasons already set forth. These operating agreements cover a broad array of commercial relationships and contain significant proprietary and commercially sensitive material. Their relevance to the specific terms of a contract between CN and Amtrak is questionable at best, and a protective order is not in place to make something relevant that is not. Amtrak also urges the Board to consider Amtrak's

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<sup>5</sup> Amtrak also proposed to limit production to operating agreements with other Class I railroads, as CN has not even purported to offer a rationale for comparing its contract terms to those of non-Class I host railroads. Finally, Amtrak did not propose to produce any operating agreements with entities operating on Amtrak's tracks, because, for the reasons discussed above, their terms are not remotely relevant to the issues in this proceeding.

compromise with respect to the production of certain operating agreements as an alternative if it concludes that some discovery is appropriate on this issue.

Dated: February 19, 2014

Respectfully submitted,

/s/Linda J. Morgan

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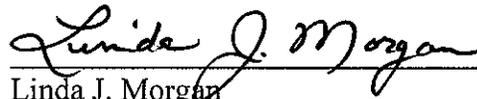
*Counsel for National Railroad Passenger Corporation*

## CERTIFICATE OF SERVICE

I certify that on February 19, 2014, a true copy of the foregoing National Railroad Passenger Corporation's Reply in Opposition to Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Requests for Production of Documents was served via email upon the following counsel of record:

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Refer To File 500417-0001

January 31, 2014

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Dear David,

This letter responds to your letter of December 27, 2013, in which you discuss CN's Request for Production No. 5 (RFP5), which seeks production of Amtrak Operating Agreements with Host Railroads ("OAs"). In its response to RFP5, Amtrak objected to production on several grounds, including that these agreements contain highly confidential and commercially sensitive information of third parties, and indicated that it would not produce any documents in response to this request.

In your letter, you offered to limit RFP5 to agreements currently in effect if Amtrak produces OAs voluntarily. You also indicated that you have no objection to reasonable confidentiality designations. You further indicated that if Amtrak were to identify particular contract provisions that it seeks to redact, CN would be willing to have its outside counsel review the OAs and Amtrak's proposed redactions to determine whether agreement can be reached regarding the appropriateness of the redactions.

Amtrak remains steadfast in its strong objections to producing these agreements. These agreements are privately negotiated and contain proprietary and commercially sensitive material involving entities that are direct competitors to CN, and thus should be accorded the utmost protection. That said, and without waiving Amtrak's objections or any arguments based on these objections, in the spirit of attempting to reach a compromise on this matter, Amtrak proposes the following:

1. Amtrak is willing to produce redacted versions of the OAs with the other Class I Host Railroads that are in effect today, including amendments, attachments, exhibits and schedules thereto.
2. These redacted versions will reflect selective redactions that Amtrak believes are appropriate based on the proprietary and commercially sensitive nature of the redacted material, and will be produced with highly confidential designations to reflect the commercial sensitivity of the non-redacted text.

**EXHIBIT 1**

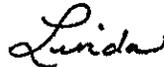
3. If upon review, CN's outside counsel has a concern regarding the redactions, outside counsel can raise those concerns with Amtrak's outside counsel.

CN has indicated that it views production of OAs as a key discovery issue in this case. There are discovery issues that Amtrak considers of similar importance. One such issue concerns documents pertaining to CN dispatching practices.

In CN's responses to Amtrak's RFP 13-18, CN objects to producing any documents relating to dispatching on rail lines upon which Amtrak does not conduct regularly scheduled passenger service or documents that relate to dispatching policies, practices, procedures, decisions or conduct that CN states do not involve and would not affect Amtrak trains. Amtrak believes that documents relating to CN's dispatching activities concerning the handling of its own trains or involving other users of its track and facilities can provide important information regarding how dispatching decisions are made concerning Amtrak trains. Thus, dispatching that may not directly involve Amtrak trains still can have an ultimate effect on the handling of Amtrak trains. By this letter, Amtrak is proposing as part of its offer to produce redacted versions of the OAs specified above that CN agree, in accordance with the time period for selection of responsive documents set forth in the Joint Discovery Protocol, to provide the dispatching documents requested by Amtrak without the limitation suggested by CN.

Resolution of these two issues is important to advancing the discovery process. I look forward to hearing from you on Amtrak's proposal.

Sincerely,



Linda J. Morgan  
of Nossaman LLP