

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35851

**GREAT CANADIAN RAILTOUR COMPANY LIMITED d/b/a ROCKY MOUNTAINEER
PETITION FOR EXEMPTION FROM SUBTITLE IV**

**REPLY OF BNSF RAILWAY COMPANY
TO GCR'S PETITION FOR EXEMPTION**

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November 20, 2014

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BNSF Railway Company (“BNSF”) hereby submits its reply to the October 31, 2014 Petition for Exemption (“Petition”) filed by Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer (“GCR”). Contending that it is a common carrier by rail subject to the jurisdiction of the Board and the requirement for operating authorization, GCR seeks such authorization “to operate a rail passenger service that Rocky Mountaineer has recently initiated between Vancouver, BC, and Seattle, WA” Petition at 1. The Petition simultaneously requests that the Board exempt GCR’s operations, which are conducted seasonally for the benefit of tourists, from all common carrier obligations imposed under ICCTA pursuant 49 U.S.C. § 10502.¹ The service in the United States for which Board authorization and exemption is sought would be operated entirely over a BNSF mainline, the Bellingham Subdivision. Accordingly, BNSF has a direct interest in this matter.

BNSF urges the Board to deny the Petition. GCR should not be granted authorization because BNSF has no continuing agreement in place with Amtrak to allow for the operation by Amtrak of GCR trains on the Bellingham Subdivision and has not been requested by Amtrak to

¹ GCR also seeks to be excused for its past unauthorized operations during 2013 and 2014, and it requests expedited handling of its Petition pursuant to a proposed 60 day schedule.

operate GCR trains going forward. Further, in light of an expected increase in freight traffic on the increasingly capacity-strained Bellingham Subdivision, the operation of any GCR trains beyond 2015 is problematic. Accordingly, because there is no legal basis for GCR trains to be operated on the Bellingham Subdivision and in light of the capacity issues on that line, BNSF submits that the Board should not grant operating authorization to GCR.

I. Background

The Petition asserts that GCR is providing the tourist service in question on a seasonal basis between Seattle and Vancouver without Board authority. Petition at 5-6.² GCR claims that it does so pursuant to a contract with Amtrak whereby Amtrak provides the rail labor, *i.e.*, train and engine crews to operate the trains between those two points. *Id.* at 6. GCR says that it owns the rail cars and employs onboard staff such as tour guides and lounge employees. *Id.* at 5. Amtrak operates the GCR service distinct from its own Seattle-Vancouver scheduled service, which also operates over the Bellingham Subdivision. That regularly scheduled Amtrak service is not at issue in this proceeding.

Amtrak operated 12 trains on behalf of GCR during the months of May through September, 2014. *Id.* at 6. The Petition states that GCR desires to operate 12 trains in 2015 and “may have the desire to modify the frequency based upon market demand.” *Id.* at 6. BNSF understands that GCR hopes to increase the level of service going forward.

BNSF does not, and is not legally required to, allow or sublet the use of its tracks to intercity passenger rail operators other than Amtrak. BNSF thus has no operating or other agreement with GCR regarding the GCR service and does not plan to enter into any such agreement. BNSF does have an agreement with Amtrak that permits Amtrak to provide its

² The service is provided and marketed as an adjunct to GCR’s service between Vancouver and the Canadian Rockies; GCR does not sell Seattle – Vancouver service on a stand-alone basis.

scheduled intercity service between, as relevant here, Seattle and Vancouver and, subject to a variety of conditions, certain other services. This agreement does not contemplate the use of BNSF's tracks by passenger train operators other than Amtrak, and it has no provision addressing the use of BNSF's tracks by GCR. BNSF has informally agreed in the past with Amtrak to allow the use of the Bellingham Subdivision for a specified limited number of Amtrak-operated GCR trains. In 2013, BNSF agreed to allow Amtrak to provide 2 round trips on behalf of GCR. In 2014, BNSF agreed to Amtrak's request to allow Amtrak to provide 12 round trips on behalf of GCR. BNSF has had some discussions regarding 12 round trips to be operated by Amtrak on behalf of GCR in 2015, but BNSF has not received a request from Amtrak with respect to 2015.

Capacity is already severely constrained on the Bellingham Subdivision. Following scheduled increases in freight traffic set to occur in the coming months, it is not expected that there will be sufficient capacity for the operation of trains other than BNSF's freight services and scheduled Amtrak trains beyond 2015.

II. Legal Framework

Under 49 U.S.C. § 24308(a), Amtrak “may make an agreement with a rail carrier or regional transportation authority to use facilities of, and have services provided by, the carrier or authority under terms on which the parties agree”³ There is no provision in the relevant statutes, and GCR cites none, that would require BNSF to grant access to its facilities directly to GCR for passenger rail transportation purposes. In addition, when Amtrak obtains access rights to a freight carrier's facilities pursuant to an agreement with that carrier or pursuant to a Board order, such rights are for specific types and levels of service and are not general access rights that

³ Alternatively, the Board has authority to “order that the facilities be made available and the services provided to Amtrak . . .” on reasonable terms. 49 U.S.C. § 24308(a)(2)(A).

allow Amtrak to operate any and all services. Thus, absent BNSF agreement for Amtrak to operate GCR trains over the Bellingham Subdivision, GCR will have no legal basis for continuing its service, whether or not it has Board-issued operating authorization or exemption of the type sought here.

This conclusion is supported by 49 U.S.C. § 24308(e), which provides that if Amtrak wishes to operate “additional trains” over the line of another rail carrier, it either must come to an agreement with the other (freight) carrier regarding the operation of additional trains or apply to the Board for an order under the statute. Thus, if additional GCR trains are going to be operated by Amtrak on the Bellingham Subdivision at any point, there must be an agreement between BNSF and Amtrak for the operation of those additional trains, following a request by Amtrak for the operation of those trains.

The proposition that GCR trains cannot be operated over BNSF’s line other than through an agreement between BNSF and Amtrak addressing the GCR service is also supported by Section 24308(a)(2)(B). This provision indicates that when the Board determines the compensation to be paid by Amtrak to the owner of the facilities, such compensation is based on the “incremental costs” of using the facilities. Of course, incremental costs are dependent on the nature and level of the service. H. Conf. Rep. No. 93-587 (Oct. 12, 1973), *reprinted in* 1973 U.S.C.C.A.N. 2331, 2336 (incremental costs are “those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled. This includes total solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs)...”). Accordingly, Amtrak cannot add services that would increase costs for BNSF without coming to an agreement with BNSF with respect to those additional services or going to the Board to set the terms and compensation with respect to those additional services.

See Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)—Union Pacific R.R. Co. and S. Pacific Transp. Co., 3 S.T.B. 143 (1998). Further, here any increase in the number of Amtrak passenger trains would require an investment in additional infrastructure on the Bellingham Subdivision in order to increase capacity on that Subdivision. There is currently no agreement in place between Amtrak and BNSF for such capacity improvements.

In short, GCR has no independent right to operate trains on BNSF's line, and no right at all in the absence of an agreement between BNSF and Amtrak. While BNSF agreed to allow Amtrak to operate GCR trains on a limited basis in the past, and BNSF is prepared to allow service in 2015 in accordance with its normal procedures with Amtrak, any service beyond 2015 would require capacity improvements which have not been agreed to.

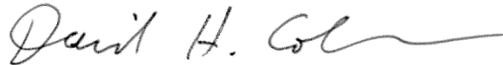
GCR's request for operating authorization and an exemption does not change this situation. If such authorization or the requested exemption were granted, and BNSF submits it should not be, GCR would have no better right to operate over BNSF's lines than it currently has. GCR cites *American Orient Express Ry. Co., LLC—Petition for Declaratory Order*, Finance Docket 34502 (STB served Dec. 29, 2005) as a situation similar to the instant case. BNSF notes that in that proceeding the Board did not grant the American Orient Express Railway Company ("AOERC"), another rail tour operator, unfettered rights to operate over the facilities of other carriers. Rather, AOERC was only able to operate pursuant to the authorization it was granted by the Board to the extent that Amtrak obtained authority from the various freight railroads, including BNSF, that agreed to allow the operation by Amtrak of the AOERC service over the lines of those freight railroads. *See id.* at 2, 4 (noting that "Amtrak pulls AOERC's vintage rail cars pursuant to a schedule for each excursion that meets the availability of both Amtrak and the host railroad" and "Amtrak pays the railroads over whose

track it runs a different rate when the track is used for AOERC service than the rate it pays when the track is used for Amtrak service.”).

CONCLUSION

For the reasons explained above, the Board should deny the request for operating authorization. While BNSF therefore does not believe that any further proceeding is necessary, BNSF intends to participate in any proceeding that the Board may initiate in response to the Petition in order to address these points. BNSF does not oppose an expeditious schedule for handling this proceeding, but requests at least a 60 day period for the submission of further pleadings should the Board initiate a proceeding.

Respectfully submitted,



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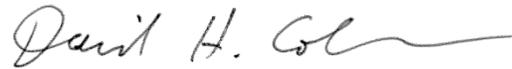
November 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2014, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon all parties of record in this case as follows:

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