

SERVICE DATE – OCTOBER 31, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

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

Digest:¹ In this decision, the Board directs the National Railroad Passenger Corporation (Amtrak) and Illinois Central Railroad Company and Grand Trunk Western Railroad Company (subsidiaries of Canadian National Railway Company) to make technical additions and corrections to their pleadings.

Decided: October 28, 2022

The National Railroad Passenger Corporation (Amtrak) operates passenger trains over thousands of route miles across the United States. Most of these trains operate over rail lines owned by private freight railroads (referred to as “host railroads”) under agreements negotiated between Amtrak and the relevant host railroad. Since the 1970s, Amtrak has operated passenger trains pursuant to such agreements over rail lines now owned by Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Company (GTW).² When the most recent agreement (the 2011 Operating Agreement) expired, however, the parties were unable to reach a new operating agreement.

Amtrak asks the Board to set reasonable terms and compensation for Amtrak’s use of CN’s facilities (including rail lines) and services. In a decision served on August 9, 2019 (Interim Decision), the Board issued interim findings and guidance on the main disputed issues and directed the parties to engage in Board-sponsored mediation in an effort to reach a final agreement. The Board stated that, if the parties reached an agreement, the Board would dismiss this proceeding; otherwise, the Board would issue a subsequent decision with its final determinations on any remaining unresolved issues.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² IC and GTW are both indirect subsidiaries of Canadian National Railway Company and direct parties to the agreement with Amtrak at issue in this proceeding. For purposes of this proceeding, “CN” refers collectively to IC and GTW, but not their parent company. (See CN Reply 1 n.1, Aug. 1, 2013; Amtrak Reply 1, Aug. 2, 2013.)

On January 22, 2020, the Board-appointed mediators submitted a letter stating that the parties had been unable to reach a settlement. More than two years later, on January 25, 2022, the parties jointly submitted a motion to reactivate the proceeding and establish a procedural schedule. Despite having engaged in Board-sponsored mediation, despite the ample time that had elapsed, and despite nearly 30 pages of guidance afforded by the Interim Decision, the parties admitted that they had failed to resolve a single one of the issues left open in 2019. (See Joint Mot. to Establish Procedural Schedule 2.) Among other issues, the parties made no progress towards resolution of on-time performance and schedules, incentives and penalties, the lookback provision, incremental costs, or performance measurement and delays. See Interim Decision, FD 35743, slip op. at 7-26.

In merits pleadings submitted between May and August of this year, the parties have resumed litigation—voluminously and acrimoniously—over these and many other issues.

It is the Board’s duty under 49 U.S.C. § 24308(a) to prescribe reasonable terms and compensation for Amtrak’s use of CN’s facilities and services, and the Board will carry out this duty. But in choosing this path, the parties have selected one of the least optimal ways of establishing the contract that will govern their commercial relationship for years to come. The Board has often stated that it favors private resolution of disputes wherever possible—for good reason, given that parties best understand their own operations and commercial needs. The parties here would have better served their interests by capitalizing on that opportunity.

To facilitate the processing of this case, the Board will direct the parties to make certain technical additions and corrections to their 2022 merits pleadings. First, on June 15, 2022, CN submitted errata to its May 27, 2022 opening submission. CN filed these errata as a table with instructions to strike out or insert words at specified locations. The Board will direct CN to file a new version of its opening submission—including all levels of confidentiality originally submitted—that incorporates these errata into the text of the document.

Second, Amtrak’s confidential and highly confidential submissions do not indicate which material Amtrak considers to be confidential or highly confidential. Although the Board reserves the right to rely upon and disclose confidential or highly confidential information in decisions when necessary, it attempts to avoid references to such information. In support of this goal, the Board will direct Amtrak to submit new versions of its confidential and highly confidential 2022 pleadings. In the highly confidential versions, Amtrak must denote confidential material with single brackets (“{ }”) and highly confidential material with double brackets (“{ { } }”). In the confidential versions, Amtrak must denote confidential material with single brackets (“{ }”) and leave highly confidential material redacted.

Third, the Board asks the parties to review the pleadings for completeness, and to confer with the opposing party if any materials are identified that have not already been provided. The Board notes that Amtrak did not submit workpapers with its opening or rebuttal submissions.³

³ In response to CN noting in its reply that Amtrak did not provide workpapers on opening, one of the individuals who had submitted a verified statement for Amtrak stated that he

To the extent workpapers, underlying tables, exhibits, or analyses exist with respect to any of the 2022 merits pleadings and were inadvertently omitted from the parties' filings, the Board will direct the parties to submit them or confirm that the Board has received the entirety of this information.

Fourth, the Board's decision on the merits will include prescription of a new operating agreement. To assist the Board's formulation of this document, the parties will be directed to provide Microsoft Word versions of the proposed operating agreements that they attached to their 2022 pleadings, including any redlined versions. Rather than submitting these Word versions as filings, the parties will be directed to email them to MILSS@stb.gov with the subject line "ATTN: FD 35743 Docket Team" and copy counsel for the opposing party.

The parties will be required to submit these materials by November 30, 2022.

Any technical questions regarding compliance with these requirements may be addressed through the Board's Office of Public Assistance, Governmental Affairs and Compliance at 202-245-0238.

Finally, the Board notes that there are numerous complex issues that remain to be resolved in this docket. These issues range from novel legal and policy questions to operational and technical matters. Based on its review of the record, the Board anticipates that it will require additional information from the parties to reach a resolution on some of these matters. Specific requests for information will be forthcoming.

The record will remain open until the parties have submitted all requested materials.

It is ordered:

1. CN is directed to file a new version of its May 27, 2022 opening submission—including all levels of confidentiality originally submitted—that incorporates its June 15, 2022 errata in the text of the document by November 30, 2022.

2. Amtrak is directed to submit new versions of its confidential and highly confidential 2022 pleadings by November 30, 2022. In the highly confidential versions, Amtrak must denote confidential material with single brackets ("{ }") and highly confidential material with double brackets ("{{ }}"). In the confidential versions, Amtrak must denote confidential material with single brackets ("{ }") and leave highly confidential material redacted.

3. Amtrak and CN are directed to submit any workpapers, underlying tables, exhibits, or analyses with respect to their 2022 opening, reply, and rebuttal pleadings that have not already been submitted or confirm that the Board has received the entirety of this information by November 30, 2022.

did not create any workpapers for that submission. (Amtrak Rebuttal, Rebuttal V.S. Weiss 4 n.4, Aug. 25, 2022.)

4. Amtrak and CN are directed to provide Microsoft Word versions of the proposed operating agreements that they attached to their 2022 pleadings, including any redlined versions, by November 30, 2022. Amtrak and CN are directed to send these Word versions by email to MILSS@stb.gov with the subject line “ATTN: FD 35743 Docket Team” and copy counsel for the opposing party.

5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.