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November 20, 2015

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**BY E-FILING**

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

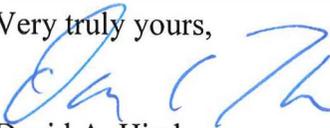
ENTERED  
Office of Proceedings  
November 20, 2015  
Part of  
Public Record

**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:

Enclosed for filing in the above-referenced docket please find CN's Motion for Leave and Response to Amtrak's Reply to CN's Motion to Remove the Confidentiality Designation for Portions of Amtrak's Opening Submissions, which is being submitted on behalf of Illinois Central Railroad Company and Grand Trunk Western Railroad Company.

Very truly yours,



David A. Hirsh

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

Enclosure

cc: Kevin M. Sheys, Esquire  
William H. Herrmann, Esquire

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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**CN MOTION FOR LEAVE AND RESPONSE TO AMTRAK'S REPLY TO CN MOTION  
TO REMOVE THE CONFIDENTIALITY DESIGNATION  
FOR PORTIONS OF AMTRAK'S OPENING SUBMISSIONS**

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November 20, 2015

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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**CN MOTION FOR LEAVE AND RESPONSE TO AMTRAK’S REPLY TO CN MOTION  
TO REMOVE THE CONFIDENTIALITY DESIGNATION  
FOR PORTIONS OF AMTRAK’S OPENING SUBMISSIONS**

CN respectfully moves for leave to file the following brief response to Amtrak’s reply to CN’s motion to remove the confidentiality designation for portions of Amtrak’s opening submission (“Reply”). CN addressed its motion (“Motion”) to the public version of Amtrak’s opening submissions filed on September 8, 2015 – the only version CN had seen when it filed its Motion. Amtrak has since changed its position twice – it withdrew some of its confidentiality designations on October 29, one day after CN filed its Motion, and it included as exhibits to its Reply a new and substantially different proposal for redaction. *See* Reply at 3 n.1.<sup>1</sup> CN should have the opportunity to address Amtrak’s changed position, and the Board will benefit from clarification as to what remains at issue (which, as explained below, Amtrak understates).

**RESPONSE**

Amtrak’s position would require the Board to adopt two new and erroneous precedents in order to sustain Amtrak’s redactions. With respect to the thresholds for penalties and incentives

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<sup>1</sup> CN infers that Amtrak proposes to make public everything not highlighted on the confidential exhibits to its Reply. CN agrees with all of Amtrak’s redactions highlighted in green, and disagrees with all of Amtrak’s redactions highlighted in red.

under the existing Operating Agreement, it would require the Board to rule that it is appropriate to categorize as Confidential under the Board’s Protective Order information that has already been made public (in this case, both prior to and in this proceeding). Amtrak discusses its other confidentiality claims in terms of maximum penalties and performance payments under its new proposal. In fact, however, it uses its argument to shield the basis for its calculation of all penalties and performance payments. It would have the Board rule, contrary to prior practice in Section 402 proceedings, that a new proposal in a Section 402 proceeding is appropriately treated as Confidential, even if the proposal itself, as here, does not reveal and is not based on pre-existing confidential or other proprietary information. The Board should decline to adopt these positions.<sup>2</sup>

**I. THE 70/80 PERCENT THRESHOLDS ARE ALREADY PUBLIC INFORMATION**

With respect to the percentage thresholds for penalties and performance payments under the current agreement, CN demonstrated that there is no reasonable basis for confidential

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<sup>2</sup> Amtrak cites no precedents for the extraordinary propositions it now asks the Board to endorse. It relies exclusively on dicta from two old cases, neither of which involved any claim of confidential treatment for public information or for a proposal that the Board is asked to adopt, and neither of which involved the Section 402 context or a publicly accountable entity subject to FOIA such as Amtrak. Amtrak ignores the judicial decisions and more recent Board decisions cited by CN that indicate that unjustified confidentiality designations will not be tolerated, *see* Mot. at 10-12, and it ignores CN’s explanation of the substantial private and public interests that would be impaired in this case by permitting Amtrak’s over-designation to stand, *see id.* at 8-9, 11-14, 19-20, 22-23, 23-26. Further, its effort (Reply at 3 n.2) to distinguish Board precedents as involving only Highly Confidential designations fails because, as shown in the *Central Oregon* case, the principles espoused by those cases are not so limited. In that case, the information at issue was initially designated as Highly Confidential, but the Board ordered that it would not suffice to re-designate as Confidential “materials that are not truly confidential;” they “shall be redesignated as ‘Public.’” *Cent. Or. & Pac. R.R., Inc. – Abandonment & Discontinuance of Service – in Coos, Douglas & Lane Cties, Or.*, No. AB-515 (Sub-No. 2), slip op. at 3 (STB served Aug. 15, 2008). In any event, the dicta on which Amtrak relies concern the resolution of legitimate “*doubts* as to the need for confidentiality,” Reply at 3; they do not permit a litigant to claim confidentiality without any reasonable basis, as Amtrak has done.

treatment because those thresholds are already public. *See* CN Mot. at 15-16 & n.10; *see also* *Nat'l R.R. Passenger Corp. – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, STB No. NOR 42134, CN Answer at 4 (filed Jan. 8, 2015) (publicly disclosing thresholds). Amtrak does not deny that or supply any justification for treating already-public information as confidential. In any event, paragraph 18 of the Board's Protective Order is conclusive: "Information that is publicly available . . . shall not be subject to this Protective Order..."

**II. THERE IS NO BASIS FOR AMTRAK'S CLAIM OF CONFIDENTIALITY FOR ITS PROPOSED NEW LEVELS OF PENALTIES AND PERFORMANCE PAYMENTS, WHICH ARE THE ESSENCE OF ITS PROPOSAL**

Amtrak casts its remaining disputed claim of confidentiality narrowly in terms of "the maximum penalty [and performance payment] amount[s] in Amtrak's proposed terms and compensation." Reply at 3. But the redactions Amtrak proposes in the name of protecting these maxima, as indicated by the text highlighted in red in its exhibits, would continue to conceal critical aspects of how its penalties and performance payments are calculated and the amounts it proposes for *any and all* performance levels.<sup>3</sup> *See* Reply Ex. A at 14, 15; Reply Ex. B at 13; Reply Ex. C, ¶¶ 43 & n.23, 44-47, 49, 51, 53-54, 57, & Apps. D & E. Amtrak would have the Board sanction treating the very essence of its proposal as Confidential. It would thus prevent the public from understanding the implications of Amtrak's proposal not only for maximum penalties and performance payments, but for penalties and performance payments at any level of

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<sup>3</sup> There is no justification for redacting the maximum penalties and performance payments Amtrak proposes, just as there is no justification for redacting other penalty and performance payment levels. But the Board should not be misled by Amtrak's suggestion that only the endpoints of its proposal would be concealed.

performance, including current levels of performance or performance that meets Amtrak's own PRIIA goal of 900 HRD minutes per 10,000 miles. *See* Mot. at 6-7.

Amtrak asserts that what it has redacted is "financial information." But Amtrak's proposal does not embody any pre-existing confidential financial realities (*e.g.*, prices, revenues, costs, or other competitive information); it is simply the financial relief Amtrak has asked the Board to impose against CN. Amtrak cites no precedent for treating such a proposal as Confidential "financial information" within the meaning of a Board protective order. To the contrary, the Board and parties have routinely treated proposals in the context of Section 402 proceedings as public, even when they have involved very specific financial information. CN discussed at length in its Motion the important public policy reasons for doing so. Mot. at 12-14.<sup>4</sup> Amtrak uses the term "financial information" to mean something that could affect future compensation under the Operating Agreement or, even more broadly, something that could affect Amtrak's future negotiations concerning compensation for other operating agreements. Under such an overbroad definition, every aspect of a proposal touching on compensation in a Section 402 case would be considered "financial information," and the substance of virtually all Section 402 proceedings would presumptively be confidential.

Amtrak's Reply, which emphasizes the litigation advantage it seeks to gain over other carriers at the expense of an open and public proceeding, confirms the suggestion in CN's Motion that Amtrak is seeking to have the Board issue an inscrutable precedent ruling on a secret

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<sup>4</sup> CN's Motion explained why the Board has properly found a need for openness, not confidentiality, in Section 402 proceedings given their precedential significance. *Id.* Amtrak's Reply fails to address that point and the Board's practice in Section 402 proceedings.

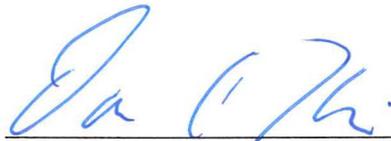
CN also explained why Amtrak's public status and FOIA obligations independently preclude its claims of confidentiality on its own behalf. *Id.* at 23-26. Again, Amtrak offers no response.

proposal. That is precisely what the Board and the ICC have always rightly avoided doing in Section 402 cases (*see* Mot. at 12-14, 21-23), and Amtrak's Reply provides no basis for the Board to reverse course.

### CONCLUSION

CN's October 28 Motion should be granted, and Amtrak should be ordered to re-file the public version of its opening statements with only the matter highlighted in green on the exhibits to its Reply redacted.

Respectfully submitted,



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*Counsel for Grand Trunk Western Railroad  
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November 20, 2015

## CERTIFICATE OF SERVICE

I certify that I have this 20<sup>th</sup> day of November, 2015, caused a true copy of the foregoing Motion for Leave and Response to Amtrak's Reply to CN Motion to Remove the Confidentiality Designation for Portions of Amtrak's Opening Submissions to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
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Spencer R. Leroux