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May 2, 2014

**BY E-FILING**

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:

Enclosed for filing in the above-referenced docket are an original and 10 copies of the Second Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, "CN") to Compel Responses to Discovery Requests. CN attempted to e-file this document yesterday afternoon but was unable to do so because of technical problems with the Board's website. This filing has already been served by e-mail upon counsel for National Railroad Passenger Corporation.

Also enclosed is a compact disc containing the text of this filing and its appendix and exhibits.

Very truly yours,



Simon A. Steel

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

Enclosures

HARKINS CUNNINGHAM LLP

*Attorneys at Law*

Ms. Cynthia T. Brown, Chief

May 2, 2014

Page 2

cc: Linda J. Morgan, Esquire (w/o enclosures)  
William H. Herrmann, Esquire (w/o enclosures)

**EXPEDITED CONSIDERATION REQUESTED**

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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**SECOND MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY  
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

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May 1, 2014

**EXPEDITED CONSIDERATION REQUESTED**

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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**SECOND MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY  
AND GRAND TRUNK WESTERN RAILROAD COMPANY  
TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (together, “CN”) respectfully move that the Board compel National Railroad Passenger Corporation (“Amtrak”) to produce the documents requested in CN’s Requests for Production of Documents Nos. (“RFPs”) 8-10 and 14, and to answer fully CN’s Interrogatories 17 and 20.<sup>1</sup>

The CN discovery requests and Amtrak responses at issue are set out in the Appendix to this motion (and, in the context of the broader sets of requests, objections and responses,

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<sup>1</sup> This is CN’s second motion to compel discovery responses. On April 15, 2014, the Board granted in part (with respect to RFP 5 – operating agreements under which another railroad hosts Amtrak) and denied in part (with respect to RFP 6 – operating agreements with Amtrak as host) CN’s first motion to compel (filed Feb. 12, 2014) (“**MTC1**”). *Application of Nat’l R.R. Passenger Corp. under 49 U.S.C. § 24308(a) – Can. Nat’l Ry. Co.*, Dkt. No. FD 35743, DO 43669 (STB served April 15, 2014) (“**MTC1 Decision**”). Insofar as pertinent, CN incorporates herein by reference its arguments in MTC1. Further, to avoid needless duplication, CN refers herein to the following Exhibits to MTC1:

**MTC1, Ex. 1** (CN’s first set of discovery requests, served Oct. 31, 2013, which includes the discovery requests at issue in both *MTC1* and this motion);

**MTC1, Ex. 2** (the parties’ agreed Joint Discovery Protocol (Jan. 30, 2014));

**MTC1, Ex. 3** (Amtrak’s responses to CN’s discovery requests, served Nov. 19, 2013).

For clarity, additional exhibits to this motion will be referenced as “MTC2, Ex. \_\_.”

including relevant definitions, in MTC1, Exs. 1 & 3). Broadly speaking (and without prejudice to the specifics of each request), CN seeks:

(1) documents and information regarding actual and potential capital expenditures and contributions by Amtrak for infrastructure on host railroad lines owned by CN and other hosts, and Amtrak's funding and funding priorities insofar as relevant thereto (RFPs 8-10, Interrogatory 20) ("infrastructure funding documents and information"); and

(2) documents and information regarding Amtrak's promulgation and implementation of measurements, classifications, and coding of delays to Amtrak trains, including complaints and issues raised concerning them (RFP 14, Interrogatory 17) ("delay coding documents and information").

Amtrak's responses to these requests severely restrict what it will produce, based only on boilerplate objections as to relevance, breadth, burden, and form (*e.g.*, "vague and ambiguous").<sup>2</sup> Amtrak refuses to provide any infrastructure funding or delay coding implementation documents or information not specific to CN's lines. That refusal rests on a view of relevance that the Board rejected when it granted CN's motion to compel production of operating agreements of other host railroads. In that decision, the Board expressly found that Amtrak's relationships with other hosts can be a source of relevant information. *MTC1 Decision*, at 6.

In addition, with respect to infrastructure funding, Amtrak refuses to provide documents regarding any projects that were not actually undertaken, including projects proposed to or considered by Amtrak but rejected. It refuses, for example, to provide documents reflecting its

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<sup>2</sup> Amtrak did not assert specific confidentiality objections for the requests at issue, which would in any event be addressed by the protective order. *See MTC1 Decision*, at 6-7. And CN has clarified its intent with respect to terms Amtrak suggested were vague or ambiguous. Accordingly, the Board at this time need only address objections to relevance, breadth, and burden.

consideration of infrastructure funding requests CN made to it in 2011. Combined with Amtrak's refusal to provide documents regarding infrastructure funding for host railroads other than CN, this objection means that Amtrak is likely to provide nothing of substance regarding infrastructure funding, since Amtrak has consistently refused to invest in or contribute to any significant CN-specific infrastructure projects.

Infrastructure funding and delay coding are important issues in this case. The delays of which Amtrak complains and the incremental costs that CN incurs are directly related to Amtrak's refusal to fund the infrastructure needed to accommodate it. And Amtrak's implementation of delay coding – how it attributes the blame for delays – is a critical element in any system of incentives and penalties that is based on delay attribution. Amtrak should not be permitted to deny CN relevant information on these issues. It should be compelled to respond fully.

CN respectfully requests, in accordance with the Joint Discovery Protocol executed by Amtrak and CN (MTC1, Ex. 2), that the Board decide this motion on an expedited basis. As both parties recognized in the Protocol, expeditious resolution of discovery motions is important to minimize further delays of the Board's schedule for this proceeding.<sup>3</sup>

### **FACTUAL BACKGROUND**

Amtrak filed its Application in this proceeding on July 30, 2013, seeking prescription, under 49 U.S.C. § 24308(a)(2)(A)(ii), of “reasonable terms and compensation” for Amtrak's use of CN's facilities (including rail lines) and services. On October 24, 2013, the parties filed statements with the Board identifying the disputed issues in this case. The issues identified by Amtrak included:

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<sup>3</sup> Accordingly, the parties agreed that responses to motions to compel shall be due within seven days. MTC1, Ex. 2, ¶ 11, at 14.

- “The amount of compensation CN [should] receive[]” for providing services to and making its facilities available to Amtrak;
- “[W]hether, and if so, under what terms, CN should receive compensation in excess of CN’s incremental costs for quality of service, including the formulation of such compensation and the administration thereof;” and
- “[U]nder what terms CN should be subject to penalties for untimely performance, including the formulation of such penalties and the administration thereof.”

Statement by Nat’l R.R. Passenger Corp. Identifying Disputed Issues at 2 (filed Oct. 24, 2013).

The issues identified by CN included:

- “Whether CN should receive compensation for (a) the incremental costs of delays to its trains incurred due to Amtrak’s use of its lines; or, in the alternative, (b) the costs of any infrastructure improvements necessary to avoid such costs;” and
- “Whether the provisions of the Operating Agreement relating to performance payments and penalties, including the formulation and administration thereof, should be modified, and if so, how.”

Statement of Ill. Cent. R.R. & Grand Trunk W. R.R. Identifying Disputed Issues at 2 (filed Oct. 24, 2013).

On October 31, 2013, CN served its first set of discovery requests, including the Requests and Interrogatories at issue in this Motion. MTC 1, Ex. 1. On November 19, 2013, Amtrak served its objections and responses thereto. MTC 1, Ex. 3.

Counsel for both parties have since had extensive discussions regarding discovery issues, including the discovery requests at issue.<sup>4</sup> They met and conferred for two days in December. On December 27, 2013, CN sent Amtrak a follow-up letter memorializing those discussions, offering certain compromise limitations on its discovery requests if Amtrak would comply

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<sup>4</sup> Due in part to the breadth of the issues posed by Amtrak, the burden and scope of discovery in this case and the range of issues that have arisen are considerable. Amtrak’s requests to CN included six requests for admission, 41 document requests, and 14 interrogatories. CN’s requests included four requests for admission, 31 document requests, and 23 interrogatories. As of today, both parties are continuing document production on a rolling basis.

voluntarily,<sup>5</sup> and seeking clarifications of Amtrak's position on, *inter alia*, the discovery requests currently at issue. MTC1, Ex. 4 ("December 27 Letter"). On February 27, 2014, having received no response from Amtrak to the December 27 Letter for over 60 days, CN wrote to Amtrak's counsel urging Amtrak to respond to CN's letter by no later than March 6, 2014, in the hope that CN would not be forced to resort to another motion to compel. **MTC2, Ex. 2.**

Amtrak finally responded to the December 27 Letter in a March 6 e-mail, which made no significant compromises or concessions regarding the requests at issue, but indicated on several points that "discussions are ongoing" within Amtrak, and/or that further discussion with CN might be fruitful. **MTC 2, Ex. 3.** CN responded on March 31, again offering compromise limitations if Amtrak would comply voluntarily. **MTC 2, Ex. 4.** Amtrak's counsel responded on April 8, stating that with respect to each of the discovery requests at issue, she was "not in a position to agree to any change in Amtrak's responses at this time." **MTC 2, Ex. 5.** Counsel for both parties met again on April 23, shortly after the Board's decision granting CN's first motion to compel with respect to Amtrak's operating agreements with non-CN hosts and rejecting Amtrak's claim that its operations over non-CN host lines are irrelevant. Despite that ruling, Amtrak's counsel informed CN's counsel that Amtrak would not change its position.<sup>6</sup>

## **ARGUMENT AND SPECIFIC REQUESTS**

As the Board recently reaffirmed:

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<sup>5</sup> As reflected in the Argument section below, CN has decided to narrow its requests in most of the respects that were contemplated in its compromise offers, and is therefore now seeking in this motion less than it sought in its original requests in October.

<sup>6</sup> Pursuant to the Joint Discovery Protocol, on April 24, Amtrak sent CN revised search terms that Amtrak proposes to use in responding to CN's discovery requests (**MTC 2, Ex. 6**). Those search terms also reflect that Amtrak does not intend to produce non-CN-specific documents in response to the requests at issue.

In Board proceedings, parties 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 requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Waterloo Ry. – Adverse Aban. – Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me.*, AB 124 (Sub-No. 2), *et al.* (STB served Nov. 14, 2003). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

*Canadian Pac. Ry. – Control – Dakota, M. & E. R.R.*, Docket No. FD 35081 (Sub-No. 2), slip op. at 2 (STB served Mar. 26, 2014) (“*CP/DM&E*”). Moreover, subject to other (non-relevance) objections, a party is entitled in discovery to “all relevant and potentially admissible information – ... not only the information that the [opposing party] believes is sufficient.” *Seminole Elec. Coop. Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (STB served Feb. 17, 2009). Further, parties are “expect[ed] ... to comply with discovery in a prompt and forthright manner,” *Ocean Logistics Mgmt., Inc. v. NPR, Inc.*, STB Docket No. WCC-102, slip op. at 2 (STB served Jan. 14, 2000), and “boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations,” *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104, slip op. at 8 (STB served Oct. 27, 2000).

Amtrak has refused, on the basis of “boilerplate” and “generalized” objections as to relevance, breadth, and burden, to produce requested documents and to provide information relevant to the issues in dispute in this case, especially those regarding compensation, incentives, and penalties. Because the information sought is relevant and potentially highly significant, because Amtrak has made no showing as to the burden of producing it, and because the burden is likely to be moderate relative to the scope of this case and the scope of the discovery burdens Amtrak has placed on CN, Amtrak should be compelled to make a full response to the requests at issue (as modified by CN’s narrowing concessions, as specified below).

**I. AMTRAK SHOULD BE COMPELLED TO PRODUCE THE REQUESTED DOCUMENTS REGARDING CAPITAL EXPENDITURES, INFRASTRUCTURE IMPROVEMENTS AND THEIR FUNDING ON EACH OF AMTRAK'S HOST CARRIER LINES (RFPs 8-10; Interrogatory 20).**

CN's RFPs 8-10 and Interrogatory 20 seek documents and information about capital expenditures or contributions to infrastructure investments Amtrak has considered, made, agreed to, rejected, or been asked to make for host rail lines over which it operates, and about funds available for such expenditures, Amtrak's efforts to obtain such funding, and Amtrak's communications with Government officials regarding its funding and funding priorities relating to its operations on host rail lines.<sup>7</sup>

Amtrak states that it will limit its responses in two ways: (1) by excluding information about expenditures and funding unless it is specific to or earmarked for CN's rail lines (for example, information about any contributions Amtrak has made, and the criteria it has considered when deciding whether to contribute, to capital expenditures on other Class I railroads);<sup>8</sup> and (2) by excluding information about funding that was requested or considered but did not result in "actual capital expenditures" by Amtrak (thus excluding, for example, information about Amtrak's consideration of capital funding requests that CN has made and Amtrak has denied). Since Amtrak has made no significant capital contributions to CN lines, this effectively means that Amtrak is refusing to provide any information relating to its consideration of, or criteria for, capital funding requests by CN or any other host railroad.

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<sup>7</sup> CN has clarified that it is not seeking information or documents relating to expenditures on or funding for the Northeast Corridor or other rail lines owned or controlled by Amtrak.

<sup>8</sup> Amtrak's responses to RFPs 8-10 contain explicit limitations to "CN rail lines" or "CN tracks." Amtrak's response to Interrogatory 20 contains a corresponding limitation to "Relevant Services," which is defined as limited to Amtrak services running on CN lines (MTC1, Ex.1, Definition 23).

Amtrak's refusal appears to be based solely on irrelevance, but the documents and information sought by RFPs 8-10 and Interrogatory 20 are relevant both to Amtrak's broad issue of "[t]he amount of compensation CN [should] receive[]," and to CN's more specific issue of "whether CN should receive compensation for (a) the incremental costs of delays to its trains incurred due to Amtrak's use of its lines; or, in the alternative, (b) the costs of any infrastructure improvements necessary to avoid such costs." As the Board has recognized, if Amtrak "strain[s] the host's] capacity [and] require[s] additional infrastructure investment," the resulting costs constitute incremental costs that are compensable by Amtrak. *Application of Nat'l R.R. Passenger Corp. under 49 U.S.C. 24308(a) – Union Pac. R.R.*, 3 S.T.B. 143, 145 (1998). In this proceeding, CN intends to demonstrate that (1) Amtrak has substantially increased the number of trains it runs on CN's lines since the early days of the relationship, while making no contribution to CN's investment in the infrastructure on which Amtrak relies; (2) Amtrak is making ever more demands that CN clear its lines to prevent any delays to Amtrak; and (3) between Amtrak's demands and the needs of its freight traffic, CN's capacity is strained, resulting in significant delays and other costs to CN's freight service. CN has asked Amtrak to contribute to added infrastructure to help address the constraints Amtrak's service have imposed on CN's rail capacity, but Amtrak has refused.

How Amtrak has treated infrastructure requests, what criteria it applied to them, why it granted or refused them, and what discussions it has had regarding such infrastructure funding with Government funding sources and other third parties, are relevant to whether Amtrak should be required to make payments for infrastructure on CN and to the reasonableness and feasibility of requiring such payments in the next operating agreement. Moreover, Amtrak's claim that it may limit its production of such information to CN-specific documents cannot be reconciled

with the Board's ruling on CN's first motion to compel, which rejected Amtrak's argument that its relationships with other host railroads are irrelevant. *See MTCI Decision*, at 6.

Other than boilerplate assertions, Amtrak has made no argument that responding fully to RFPs 8-10 and Interrogatory 20 would impose any undue burden on it. Nor would such an argument be plausible, given the importance of the evidence, the scope of this case, Amtrak's ability to use efficient electronic search terms pursuant to the parties' Joint Discovery Protocol, and the probability that host rail line-related infrastructure funding and capital expenditure documents are a limited and discrete set of materials. Moreover, while CN has limited the scope of its requests (for example, by excluding capital expenditure and funding issues relating to Amtrak's Northeast Corridor), Amtrak has made no effort to develop a compromise proposal that would balance any yet-to-be-revealed burdens with CN's right to relevant information. Thus, Amtrak has failed to support any burden objection.

Accordingly, Amtrak should be compelled to produce documents and information relevant to its consideration of or discussions about infrastructure funding both when that funding occurred and when it did not ultimately occur, and it should be compelled to provide infrastructure funding documents and information relevant to all non-Amtrak host rail lines, not just CN, in accordance with CN's RFPs 8-10 and Interrogatory 20.

**II. AMTRAK SHOULD BE COMPELLED TO RESPOND FULLY TO CN'S REQUESTS REGARDING THE CLASSIFICATION, MONITORING, RECORDING, OR CODING OF DELAYS TO AMTRAK TRAINS (RFP 14; Interrogatory 17(b)).**

CN's RFP 14 and Interrogatory 17(b) seek documents and information regarding Amtrak's coding of delays to its trains, including the classification, monitoring, recording, reporting, measurement, and description of such delays (in short, "delay coding"). With respect to documents relating to delay coding under operating agreements, in order to assuage any

concerns regarding burden, CN has narrowed its original request in RFP 14 to seek only documents dated May 1, 2011 to October 31, 2013 and only documents relating to Amtrak's operating agreements with Class I host railroads.<sup>9</sup> In Interrogatory 17(b), CN asked Amtrak to identify documents "related to complaints, grievances, Ombudsman files, whistleblower disclosures, reports, and any other documents including criticism or an assessment regarding . . . Amtrak's promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains."<sup>10</sup>

There is no doubt that information related to delays to Amtrak trains is relevant to this proceeding – both parties have recognized as much. Indeed, some of Amtrak's broadest and most burdensome discovery requests to CN concern delays to Amtrak trains.<sup>11</sup> And Amtrak's implementation of delay coding is directly relevant to the second and third issues raised in

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<sup>9</sup> In RFP 14, CN originally sought "all documents from 2008 to the present relating to communications between and among Amtrak employees, or between and among Amtrak employees and former employees, relating to the classification or coding of delays to Amtrak trains for HRD or for purposes of any Operating Agreement." The limitations noted above were offered by CN in negotiations in December. *See* MTC 2, Ex. 1, at 3. Although Amtrak did not accept CN's offer, CN believes that this particular limitation is appropriate in order to minimize burden and focus on the documents most likely to be significant. The limitation does not, however, apply to HRD or other PRIIA-metric-related coding, since (i) Amtrak's PRIIA metrics purport to be uniform in their application to all host railroads, and (ii) the parties agreed in the Joint Discovery Protocol to exclude documents relating to PRIIA metrics from the general May 1, 2011 discovery starting point, *see* MTC 1, Ex. 2, ¶ 1(a)(i)(2).

<sup>10</sup> Assuming that Amtrak produces what it says it will produce, CN has no objection to Amtrak's response to Interrogatory 17(a).

<sup>11</sup> For example, Amtrak's RFP 13-17 seek all documents concerning CN's policies, practice and procedures relating to dispatching, plus related communications, investigations and disciplinary proceedings; Amtrak's RFP 18 seeks all documents "logging or recording decisions made by dispatchers;" and Amtrak's RFP 24 seeks, among other things, all documents logging or recording "the movements of Amtrak trains" anywhere on CN lines and "the alleged cause(s) of delays experienced by Amtrak trains" on CN lines. CN is providing documents that respond to all of those requests, subject to appropriate objections.

Amtrak's statement of the issues: incentives and penalties. Under 49 U.S.C. § 24308(a), "untimely performance" and "quality of service" are factors to be considered in determining, respectively, penalties and incentives.

Under the terms of the 2011 Operating Agreement (and, so far as CN is aware, most Amtrak operating agreements with host railroads throughout its history), incentives and penalties are based on a contractually defined "on-time performance" metric ("contractual OTP"). In order to avoid penalizing the host railroad for problems outside of its control, contractual OTP is defined in a manner that excludes instances of untimeliness that are caused by delays classified as not attributable to the host railroad. Amtrak's employees' implementation of agreed rules of classification determines the initial (and, more often than not, the ultimate) classification of the delay, and, thus, whether the host railroad is penalized for any resulting untimeliness.

Amtrak's delay coding and classification would likewise play a central role under an incentive/penalty provision directly tied only to standards for acceptable levels of Amtrak delay. Amtrak has advocated such a system in the past and may advocate such a system in this proceeding. Any such proposal would rely even more directly on delay classification and coding by driving the imposition of penalties or incentives based solely on an accumulation of delays. Amtrak has held out its "Host-Responsible Delay" ("HRD") metrics under PRIIA as a supposed model for the standards for such a system.

Amtrak's implementation of the delay classification rules is thus critical to CN's compensation under either a contractual OTP or a solely delay-based system of penalties and incentives. Whether a contractual OTP system or a solely delay-based system is more reasonable, and how it should be calibrated (*e.g.*, at what percentage level of contractual OTP incentives or penalties should begin) both depend heavily on how the delays to be counted against CN are defined, and on how Amtrak interprets and implements those definitions. For

example, insofar as Amtrak is implementing its definition of HRD or other delay standards based on data that ignores the root cause of delays, or in a manner that unfairly and inaccurately defaults to blaming the host railroad for delays, operating agreements should be structured to ensure that host railroads are not unfairly penalized as a result.

Based on an apparent relevance objection, Amtrak again seeks to limit its responses to these requests to CN-specific documents. In response to RFP 14, Amtrak flatly refuses to produce documents relating to coding of delays to Amtrak trains that are not specific to CN lines. In March, Amtrak provided a somewhat more nuanced response to Interrogatory 17(b), but it still refuses to provide non-CN-specific documents regarding the “implementation” of its delay coding:

We agreed to produce documents pertaining to CN. You have asked that we also provide non-CN specific documents. Amtrak has already agreed to produce relevant business records that cover such policies, practices and procedures in response to this and other requests. Production of the “implementation” of such policies, practices and procedures for all Amtrak trains is overbroad. If CN has any specific “implementation” documents that it seeks, I would be happy to discuss the issue further.

MTC2, Ex. 3, at 2.

Amtrak’s position would deprive CN of relevant and important information. Moreover, it conflicts with the Board’s ruling acknowledging that Amtrak’s relationships with other host railroads may provide relevant evidence. *MTCI Decision*, at 6.

Whether or not a delay should be blamed on a host railroad raises common, recurring issues wherever Amtrak runs – not just on CN’s lines. Indeed, Amtrak purports to “implement” a uniform definition of “HRD” nationwide. And most of those issues are issues of “implementation.” As CN pointed out to Amtrak, such “policies, practices and procedures” as CN is aware of are general in nature and leave considerable room for interpretation, application, and misapplication. MTC 2, Ex. 4, at 2.

Under Amtrak's CN-lines-only limitation, Amtrak appears to propose producing only its general "policies, practices and procedures" – largely public documents unlikely to address practical realities and implementation and bias issues – and its CN-specific documents (which may consist largely of correspondence with CN that CN already has). CN would thus be deprived of two kinds of relevant documents: (1) criticisms by other host railroads of Amtrak's unreliability or bias in assigning responsibility, and Amtrak's internal and external reactions to such criticisms; and (2) more general discussions of how Amtrak codes delays that may not be specific to, and may not mention, any particular host railroad, but that relate to how Amtrak codes delays on CN and elsewhere. Amtrak's intended electronic search terms, shared with CN on April 24 pursuant to the Joint Discovery Protocol, confirm this: the search terms relating to delay coding would only identify documents containing a specific reference to CN (or to CN-specific locations or trains). MTC 2, Ex. 6. As CN explained in its March 31 email, Amtrak's position "would disable CN from understanding (i) issues that may not have directly affected CN to date but may affect CN in the future, (ii) how widespread issues and criticisms have been with respect to Amtrak policies and procedures, and (iii) the extent to which Amtrak has or has not been consistent in developing and applying policies and procedures to various host railroads." MTC 2, Ex. 4, at 3. That information is plainly relevant.

Finally, what CN is requesting is not unduly burdensome. Notwithstanding Amtrak's March 6 e-mail suggestion (MTC 2, Ex. 3), it is not, of course, CN's job to tell Amtrak what documents Amtrak has that CN has not seen but would like to see. But CN has made clear that it is not seeking every document relating to every host railroad that includes or refers to any delay code. Instead, CN has explained that it seeks only those documents that contain discussion of what delay codes mean and how delay codes have been or should be applied:

As a guide . . . we are particularly interested in documents relating to criticisms and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes, (ii) Amtrak's internal processes for and inconsistencies in reviewing coding issues, and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (e.g., imposing time limits on carriers seeking to identify coding errors).

MTC 2, Ex. 4, at 3. Moreover, CN has voluntarily limited the operating agreement delay coding-related documents it seeks to the 2011 to 2013 time frame and to operating agreements with Class I carriers. Further, any burden of production will be limited by Amtrak's ability to use appropriate electronic search terms pursuant to the parties' Joint Discovery Protocol.

Accordingly, CN's RFP 14 and Interrogatory 17 both seek relevant information and are not unduly burdensome.<sup>12</sup> Amtrak should be compelled to respond fully to each.

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<sup>12</sup> They are certainly far less burdensome than Amtrak's own requests to CN. *See* n. 11, *supra*.

## CONCLUSION

The Board should order Amtrak to (1) produce in full the documents described in CN's Requests for Production Nos. 8 through 10, and 14, and (2) provide complete answers to CN's Interrogatories Nos. 17 and 20. Further, the Board should give expedited consideration to this motion, in accordance with the Joint Discovery Protocol.

Respectfully submitted,



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*Counsel for Illinois Central Railroad Company  
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May 1, 2014

## **APPENDIX**

The CN requests, and Amtrak's corresponding responses, at issue in this motion are as follows:

### **I. Infrastructure Funding Documents and Information**

#### **REQUEST FOR PRODUCTION NO. 8**

Please produce all documents relating to any consideration of, or communications regarding, actual or potential capital expenditures (whether by Amtrak or by the Host Railroad or by other entities or jointly) or contributions to capital expenditures to improve, facilitate, or reduce costs associated with Amtrak service on any Host Railroad's tracks since 2003.

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 8**

Amtrak objects to this Request for Production on the ground that is vague and ambiguous and calls for speculation, including as it relates to "potential capital expenditures." Amtrak further objects to this Request for Production on the grounds that it is compound, overbroad, including as to time, unduly burdensome and oppressive, and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding to the extent Host Railroad is defined to include railroads other than IC or GTW. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak will produce any responsive, non-privileged documents related to actual capital expenditures to improve, facilitate or reduce costs associated with Amtrak's service on CN's tracks for the time period between 2008 and the present at a time and place and in a format mutually agreed upon by Amtrak and CN.

#### **REQUEST FOR PRODUCTION NO. 9**

Please produce all documents from 2006 to the present relating to monies earmarked or otherwise available to Amtrak to fund, contribute to, or compensate a Host Railroad for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad.

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 9**

Amtrak objects to this Request for Production on the grounds that it is compound, overbroad, unduly burdensome and oppressive, and vague and ambiguous with respect to use of the terms "otherwise available" and "earmarked". Amtrak further objects to this Request for Production on the ground that it seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding to the extent it seeks

information relating to Host Railroads other than IC or GTW. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak will produce any responsive, non-privileged documents related to any funds allocated to Amtrak for the specific purpose of compensating CN for capital expenditures or capacity or infrastructure improvements on CN's rail lines for the time period between 2008 and the present at a time and place and in a format mutually agreed upon by Amtrak and CN.

#### **REQUEST FOR PRODUCTION NO. 10**

Please produce all documents from 2006 to the present relating to Amtrak efforts to obtain funds from public or private sources for capital expenditures or capacity or infrastructure improvements on the rail lines of any Host Railroad.

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 10**

Amtrak objects to this Request for Production on the grounds that it is compound, overbroad, including as to time, unduly burdensome and oppressive, and seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding to the extent Host Railroad is defined to include railroads other than IC or GTW. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak will produce any responsive, non-privileged documents related to any Amtrak efforts to obtain funds for capital expenditures or capacity or infrastructure improvements on CN's rail lines for the time period between 2008 and the present at a time and place and in a format mutually agreed upon by Amtrak and CN.

#### **INTERROGATORY 20:**

Identify and describe with particularity all documents relating to communications between Amtrak (including its employees, representatives or agents) and Government agencies, Members of Congress, congressional committees, state governors, and their staffs regarding the Relevant Services or Amtrak's funding, funding needs, or funding priorities. For each such document, identify all employees, representatives, former employees, and former representatives of Amtrak who participated in or contributed to it or who may have knowledge or documents relating to it.

#### **RESPONSE TO INTERROGATORY 20:**

Amtrak objects to this Interrogatory on the grounds that it is compound, overbroad, unduly burdensome and oppressive. Amtrak further objects to this Interrogatory on the ground that it seeks information that is equally available to CN. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak will produce relevant business records relating to communications between Amtrak and Government agencies, Members of Congress, Congressional Committees, State Governors, and their staffs

regarding the Relevant Services from which this information can be derived or ascertained by CN as easily as it can by Amtrak in accordance with 49 C.F.R. § 1114.26(b) and Instruction 11.

## **II. Delay Coding Documents and Information**

### **REQUEST FOR PRODUCTION NO. 14**

Please produce all documents from 2008 to the present relating to communications between and among Amtrak employees, or between and among Amtrak employees and former employees, relating to the classification or coding of delays to Amtrak trains for HRD or for purposes of any Operating Agreement.

### **RESPONSE TO REQUEST FOR PRODUCTION NO. 14**

Amtrak objects to this Request for Production on the grounds that it is overbroad and potentially seeks documents neither relevant to nor calculated to lead to the discovery of admissible evidence in this proceeding. Subject to and without waiving Amtrak's foregoing general and specific objections, Amtrak will produce any responsive, non-privileged documents related to any Amtrak communications pertaining to the classification or coding of delays to Amtrak trains on CN's lines for HRD or for purposes of the 2011 Operating Agreement at a time and place and in a format mutually agreed upon by Amtrak and CN.

### **INTERROGATORY 17:**

Identify all documents related to complaints, grievances, Ombudsman files, whistleblower disclosures, reports, and any other documents including criticism or an assessment regarding (a) Amtrak's operation of the Relevant Services, or (b) Amtrak's promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains.

### **RESPONSE TO INTERROGATORY 17:**

Amtrak objects to this Interrogatory on the ground that it is compound. Amtrak further objects to this Interrogatory on the grounds that it is vague, ambiguous and overbroad, including with respect to use of the term "assessment." Subject to and without waiving Amtrak's foregoing general and specific objections, for (a) and (b) Amtrak will produce the relevant business records in connection with the Relevant Services from which this information can be derived or ascertained by CN as easily as it can by Amtrak in accordance with 49 C.F.R. § 1114.26(b) and Instruction 11.

**CERTIFICATE OF SERVICE**

I certify that I have this 1st day of May, 2014, caused a true copy of the foregoing Motion of Illinois Central Railroad Company and Grand Trunk Western Railroad Company to Compel Responses to Requests for Production of Documents, to be served by e-mail upon:

Linda J. Morgan  
Nossaman LLP  
1666 K Street, NW, Suite 500  
Washington, DC 20006  
[lmorgan@nossaman.com](mailto:lmorgan@nossaman.com)

William H. Herrmann  
Managing Deputy General Counsel  
National Railroad Passenger Corporation  
60 Massachusetts Avenue, N.E.  
Washington, DC 20002  
[herrmaw@amtrak.com](mailto:herrmaw@amtrak.com)

  
Jennifer S. Schafer

# Exhibit 1

# HARKINS CUNNINGHAM LLP

## Attorneys at Law

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December 27, 2013

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 and Paul:

Thank you for meeting and conferring with us on December 12 and 17 regarding the proposed discovery protocol and the parties' respective objections and responses to written discovery. The purpose of this letter is to memorialize the key points of our discussions; we look forward to receiving any proposed additions or revisions you may have.

## **I. Discovery Protocol and Document Production Process**

We agreed:

- (1) that, absent further order or agreement, privilege logs shall not be required;
- (2) that production should be made on a rolling basis by both sides; and
- (3) to promptly exchange and discuss search terms and custodian information (including identification of each custodian's position, the dates the custodian has occupied the position, the custodian's supervisor(s), and any predecessors to the custodian within the relevant timeframe), so that document searches and production can proceed with mutually understood parameters, but not to unnecessarily delay the beginning of document production pending such exchange and review.

You explained that your December 11 revised draft in response to our November 18 draft was intended to simplify and shorten our draft while preserving its key points, and invited our feedback. In response, we identified various concerns arising from your revisions (relating to, *e.g.*, metadata, file formats, exchange of sample files, production of native files, redaction of spreadsheets, placeholders, and delineation of paper files). The parties agreed at our second session (1) to consolidate the categories of metadata identified in our draft proposal into one master list but to retain all categories; (2) that we would provide proposed language to address the remaining issues, which we will do shortly; and (3) to consider conferring informally with STB staff regarding whether the discovery protocol might be entered as an order of the Board.

Linda J. Morgan, Esquire  
Paul L. Knight, Esquire  
December 27, 2013  
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## **II. Amtrak's Objections and Responses to CN's Discovery**

**General Objection 4:** You clarified that Amtrak did not intend to limit its production to responsive documents in its immediate possession but rather, consistent with Board rules, to produce responsive documents in its possession, custody or control.

**Requests for Admissions 1-4:** We agreed to table discussion of Amtrak's substantive responses pending CN's consideration of your request to release Amtrak from being deemed to have admitted CN's Requests for Admissions for failing to respond within 30 days.

**Request for Production 5:** We disputed Amtrak's objections to CN's request for copies of its operating agreements with other host railroads. We explained that we consider other operating agreements highly relevant because they show what has been deemed reasonable in the marketplace and the Board has relied on such documents in past proceedings; that in our understanding such agreements typically do not contain confidentiality provisions; and that, in any event, they could be accorded confidential treatment under the protective order. CN does not need its own operating agreements with Amtrak, and would limit its request to Amtrak operating agreements currently in effect with other host railroads if Amtrak would produce them voluntarily; however, absent agreement, we would likely file a motion to compel. You agreed to reconsider our request and let us know whether Amtrak will voluntarily produce its current operating agreements with other host railroads.

At our second meeting, you suggested that one possible approach might be for CN to indicate which portions of the operating agreements it particularly requires, and for Amtrak to produce only those portions. By letter emailed [earlier today], we have responded to that suggestion.

**Requests for Production 6 and 7:** We disputed Amtrak's objections to these requests; discussed that the issues regarding Amtrak's agreements in its capacity as a host railroad are similar to those presented by RFP 5; and stated that absent a voluntary resolution CN will likely move to compel. You reported on December 17 that Amtrak was still considering our request. In the above-referenced letter to Linda emailed earlier today we suggested that if we settle on an approach to resolve RFP 5 it might possibly be applied to our requests such as RFP 6, in which Amtrak serves as a host.

**Requests for Production 8-10:** We discussed the relevance of documents reflecting Amtrak's efforts and involvement to obtain funding for capital expenditures on the lines of other host railroads over which Amtrak operates. We stated that, if Amtrak responds fully to RFP 8, CN would be willing to accept the limitations stated in Amtrak's responses to RFPs 9 and 10. You agreed to confer with your client and let us know whether Amtrak will voluntarily produce documents responsive to RFP 8 relating to other host railroads.

Linda J. Morgan, Esquire

Paul L. Knight, Esquire

December 27, 2013

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**Request for Production 12:** You stated that you had construed this request as seeking documents relating to the negotiation of the 2011 Operating Agreement. We explained that the request is not so limited, but rather includes documents relating to Amtrak's analysis or consideration of compensation terms for a future operating agreement with CN from 2008 onwards, including the 2013 negotiations. You agreed to reconsider the full scope of the request and let us know what your client will produce.

**Request for Production 14:** We disputed the limitation in your response to documents relating specifically to CN lines; explained the relevance of information regarding how Amtrak handles the classification and coding of delays on other host rail lines; and noted that we will likely move to compel if the limitation persists. You agreed to reconsider and let us know whether Amtrak will produce responsive documents that are not specific to CN lines. In a further effort to reach a compromise on this request, with respect to carriers other than CN we are willing to limit the request to Class I carriers and to May 1, 2011 forward.

**Request for Production 18:** We explained that documents relating to ticket pricing are relevant insofar as Amtrak revenues, Amtrak ridership, and their relation to OTP are relevant, and noted that its relevance was underscored by the fact that at one point in the negotiations Amtrak had proposed that the value of the Relevant Services to Amtrak should form the basis for the incentive and penalty payment structure. You indicated after our explanation that you understood the relevance of RFP 18; accordingly, please confirm that you will search for and produce responsive, non-privileged documents.

**Request for Production 20:** You suggested that notwithstanding that "Public Benefit" is a statutory term, it is not well defined. We noted that this request is limited in nature and suggested that insofar as Amtrak has made claims, or reviewed or submitted analyses, projections or quantifications, of the benefits to the public or of the public interest in Amtrak service or Amtrak OTP, such documents should be identifiable and not unduly burdensome to produce. You agreed to search for responsive documents in light of that clarification.

**Request for Production 30:** We discussed that Amtrak's response did not explicitly address CN's request for Workpapers; agreed that the definition of "Workpapers" in CN's discovery requests is based on the conventional understanding of the term in Board proceedings; and agreed that both parties will provide workpapers consistent with that definition.

**Interrogatory 17:** You stated that you intended to limit Amtrak's response to part (b) of this Interrogatory to documents relating to CN. We explained why documents relating to criticisms or assessments of Amtrak's promulgation or implementation of policies, practices, or procedures for monitoring, recording, coding, reporting, or measuring delays to Amtrak trains on other Host Rail Lines are relevant to the issues in this proceeding. You agreed to reconsider

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providing a full response to part (b) that would include non-CN specific documents, and we await your response.

**Interrogatory 18:** You agreed to produce a copy of the Delay Data Recording Policy identified in Amtrak's response, and to follow up with Amtrak personnel to provide us with answers to the following requests for clarification about the content of the response: (1) whether the reference to "the primary sources and stores of data maintained by Amtrak" meant that there were also other sources of data relating to the operational performance of the Relevant Services and, if so, what those are; and (2) what happens to the data on Amtrak train arrival and departure times after it is maintained in Amtrak's transaction based mainframe system ARROW for seven days..

**Interrogatory 19:** You advised us that the words "or under" in the penultimate line of Amtrak's response should be deleted.

**Interrogatory 20:** We explained that this Interrogatory seeks information relating to communications with the specified entities about Amtrak's funding, funding needs, and funding priorities generally, and not just for its services on CN lines. We offered to limit the request to exclude documents relating specifically to the Northeast Corridor. You agreed to reconsider this Interrogatory with your client, and we await your response.

**Interrogatory 21:** We explained that "processes" means Amtrak's established and customary procedures; "corrected" means changed; and "criteria" means what was considered in making the decision. With that further explanation, you acknowledged that the Amtrak personnel responsible for performing the referenced activities should understand these terms.

### **III. CN's Objections and Responses to Amtrak Discovery**

**Requests for Production 1-3, 6-9, 40-41, and Interrogatory 11:** We explained that we stood on our objections to producing documents or providing information about the Revised Proposal that CN made to Amtrak 10 days before Amtrak filed its complaint, and noted that CN will be producing both workpapers and documents responsive to other requests (*e.g.*, RFPs 4-5, 10) that may relate to the determination in this proceeding of costs of delays to CN freight trains caused by Amtrak's operations over its lines. You reserved your position, but acknowledged that you understood our position.

**Requests for Production 4 and 5:** You asked what we intend to produce in response to these requests. I responded that the R-1 reports available on STB's website will give Amtrak the raw cost information responsive to this request and that CN will search for additional responsive documents within its custodians' files, but that we are not yet able to anticipate what our

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Paul L. Knight, Esquire  
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searches may uncover. We invited you to let us know if there are any specific types of documents for which you would like us to search.

**Request for Production 35:** We explained that we do not consider documents relating to CN efforts to obtain government funding for capital expenditures relevant to this proceeding, because CN has no statutory or contractual obligation to make capital investments to support or facilitate Amtrak passenger operations over its lines. However, CN is willing to respond to this request if Amtrak agrees to provide a complete response to CN's RFP 8, discussed above.

**Request for Production 36:** We agreed that CN will produce documents responsive to RFP 36, if any, if and when CN makes a claim for compensation for lost revenues under freight contracts that penalize CN for delays.

**Request for Production 38:** CN has agreed to search for and produce responsive, non-privileged documents. You agreed to advise us if Amtrak is looking for any documents in particular.

**Interrogatory 6:** You noted that the reference to Interrogatory 4 was a typographical error and that the intended reference was to Interrogatory 5. In any event, consistent with CN's other responses, including to Amtrak's Interrogatory 5, and consistent with Amtrak's objection and refusal to respond to CN's Interrogatory 3, CN will not at this time provide an answer to Interrogatory 6 as corrected by Amtrak.

#### **IV. Establishment of Common Reciprocal Cut-Off Dates**

Subject to confirmation with your client, we agreed that a general starting date for document production of May 1, 2011 (encompassing documents created, revised, sent, in force, in effect, or in operation from that date onwards) is appropriate for most document requests on both sides, subject to certain exceptions. We identified as potential exceptions – candidates for longer periods – (1) documents relating to actual and potential capital expenditures and investments and infrastructure/capacity issues; and (2) documents relating to general discussions or analyses of public policy issues or PRIIA metrics.

We agreed that reaching agreement on date ranges should be a top priority because definite date ranges are fundamental to document searches and thus essential to the expeditious flow of document production. You indicated that you expected to get back to us on the starting date issue by December 19. Not having heard back from you, on the afternoon December 20 I emailed Linda asking if she had an answer from Amtrak. Linda and I spoke later in the day and agreed to May 1, 2011 as a general starting date, but Linda indicated that Amtrak was still considering potential exceptions, and that she expected to get back to me on that issue by December 23. We are still awaiting clarification of Amtrak's position on this last issue.

# HARKINS CUNNINGHAM LLP

*Attorneys at Law*

Linda J. Morgan, Esquire  
Paul L. Knight, Esquire  
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## V. Conclusion

The above summarizes our understanding of the agreements and disagreements reached, and commitments made, at our meet and confer sessions. Please confirm your agreement with the above and let us know if you believe we have misstated or omitted anything of significance. We look forward to your responses to the items that you agreed to investigate or reconsider, and are hopeful that we can resolve them without Board intervention.

Sincerely,



David A. Hirsh

cc: Theodore K. Kalick, Esquire

# Exhibit 2

# HARKINS CUNNINGHAM LLP

*Attorneys at Law*

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Telephone 202.973.7600  
Facsimile 202.973.7610

February 27, 2014

By Email

Linda J. Morgan, Esquire  
Paul L. Knight, 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 and Paul:

It has now been two full months since I sent you my letter dated December 27, 2013, in which I asked you to confirm your agreement with how I had characterized our meet-and-confer discussions or to “let us know if you believe we have misstated or omitted anything of significance.” Of particular concern, the letter discussed CN’s issues with Amtrak’s responses to 11 specific CN document requests (two of which are now the subject of CN’s pending motion to compel) and five specific CN interrogatories, and suggested a number of compromises concerning those responses. As the letter noted, with respect to most of CN’s requests, our discussions earlier in December had concluded with your promise to review the requests with your client, reconsider Amtrak’s responses, and advise us accordingly.

Sixty-two days later, we have received no response to our letter or to most of the points it raised, and we have not received the promised clarifications of Amtrak’s position regarding various CN discovery requests. Moreover, we have received no indication from Amtrak as to when it will provide this basic information.

Amtrak’s failure over this extended period to follow through on the commitments it made during our December meet-and-confer would seem to leave CN with no choice but to seek Board intervention to bring order to the discovery process. Accordingly, to avoid further discovery-related motions, delays, and burdens, we urge you to respond as soon as possible, but in no event

HARKINS CUNNINGHAM LLP

*Attorneys at Law*

Linda J. Morgan, Esquire  
Paul L. Knight, Esquire  
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Page 2

later than March 6, to the outstanding issues noted above regarding Amtrak's responses to CN's discovery requests.

Sincerely,



David A. Hirsh

cc: Theodore K. Kalick, Esquire

# Exhibit 3

From: "Morgan, Linda J." <lmorgan@nossaman.com>  
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>,  
Date: 03/06/2014 08:11 PM  
Subject: Discovery Requests/Response to February 27th Letter

David,

I am responding to your February 27, 2014, correspondence regarding certain discovery requests to which Amtrak responded that either we would not produce what was requested, or we would produce certain documents but not everything that was requested. You focus on 11 specific CN document requests (two of which as you note are now the subject of CN's pending motion to compel) and 5 specific CN interrogatories.

**RFPs:**

1. RFP 5 & 6: These are now the subject of CN's pending motion to compel.
2. RFP 7: This document request relates to compensation received or sought by Amtrak for delays or interference to Amtrak trains due to hosting any non-Amtrak passenger service on rail lines owned, leased or operated by Amtrak. Amtrak continues to strongly believe, as it has argued in response to CN's motion to compel, that operating agreements and related arrangements that are in place where Amtrak is the host are not relevant to this proceeding.
3. RFP 8-10: These requests pertain to: a) all documents relating to actual or potential capital expenditures or contributions to capital expenditures, (RFP 8); b) all documents relating to monies earmarked or otherwise available to Amtrak to provide to any Host Railroad for capital expenditures (RFP 9); or c) all documents relating to Amtrak efforts to obtain funds for capital expenditures on the rail lines of any Host Railroad (RFP 10). In response to all three of these RFPs, Amtrak indicated that it would produce documents that pertain to CN. CN has offered to accept Amtrak's response to RFPs 9 & 10 if we agree to provide all the documents CN seeks in response to RFP 8. I am willing to further discuss with Amtrak the production of documents regarding actual capital expenditures in RFP 8. But we would not agree to provide documents pertaining to "potential" capital expenditures, which is an overly broad request and calls for speculation.
4. RFP 12: I do not see a disagreement here. We agreed to produce responsive, non-privileged documents related to the renegotiation of the 2011 Operating Agreement.
5. RFP 14: This request asks for all documents relating to communications involving current and former Amtrak employees pertaining to the classification or coding of delays to Amtrak trains for Host Responsible Delay or for purposes of any Operating Agreement. Amtrak agreed to provide documents specific to CN lines. You have indicated a willingness to limit the request to CN and other Class I host railroads. While I am not in a position to agree to your request at this time, discussions are ongoing.
6. RFP 18: This request asks for documents relating to Amtrak's pricing of passenger tickets on CN lines. You have suggested that I communicated my agreement regarding the relevance of this request, which is not accurate. I indicated that I understood where you were coming from, which certainly should not have been read to suggest a comment on the legal standard of relevance. In any event, Amtrak's search terms include ticket revenues and ridership, which should pertain to this issue.

7. RFP 20: Regarding the term “public benefit,” Amtrak is still unclear as to what CN is seeking, but we will see what documents turn up.

8. RFP 30: I see no disagreement as to the definition of work papers.

**Interrogatories:**

1. Interrogatory 17: This interrogatory asks for the identification of all documents related to complaints and any other documents including criticism or an assessment relating to CN, or Amtrak’s promulgation or implementation of policies, practices or procedures relating to delays to Amtrak trains. We agreed to produce documents pertaining to CN. You have asked that we also provide non-CN specific documents. Amtrak has already agreed to produce relevant business records that cover such policies, practices and procedures in response to this and other requests. Production of the “implementation” of such policies, practices and procedures for all Amtrak trains is overbroad. If CN has any specific “implementation” documents that it seeks, I would be happy to discuss the issue further.

2. Interrogatory 18: This interrogatory relates to databases, which I thought you had suggested we would be discussing separately.

3. Interrogatory 19: I see no issue in dispute.

4. Interrogatory 20: This interrogatory relates to CN’s requests for all documents relating to communications between Amtrak and Members of Congress and other governmental officials concerning CN or Amtrak funding. Amtrak agreed to produce documents related to CN. CN’s request also sought documents relating to Amtrak funding covering its entire system. You have offered to limit your request to exclude documents pertaining to the Northeast Corridor. This matter is in discussion.

5. Interrogatory 21: I see no issue in dispute.

Happy to discuss any of this further as you wish.

Linda

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# Exhibit 4

**Re: Discovery Requests/Response to February 27th Letter**

03/31/2014 04:01 PM

**David A. Hirsh** to: Morgan, Linda J.

Linda:

This email (A) responds to your email below concerning the meet and confer issues discussed in my December 27, 2013 letter (to which I urged you to respond in my February 27, 2014 letter), (B) provides comments on the search terms you forwarded separately on March 6, and (C) provides minor revisions we've determined are required to the CN search terms that I sent you on March 14.

**(A) With respect to the issues identified by us as part of the meet and confer process, the following bear further comment at this time:**

**RFP 7:** We ask Amtrak to reconsider its refusal to produce information relating to its own hosting of passenger rail service, particularly if in response to CN's pending motion to compel with respect to RFP 6 the Board orders Amtrak to produce information relating to its own hosting.

**RFP 8-10:** As you note, we offered to accept the limitations in Amtrak's responses to RFP 9 and 10 if Amtrak agrees to produce voluntarily the documents responsive to RFP 8 relating to other host railroads. RFP 8 seeks documents relating to actual or potential capital expenditures or contributions to capital expenditures to improve, facilitate, or reduce costs associated with Amtrak service on host railroads. Rather than agree to our offer, you state that you are "willing to further discuss with Amtrak the production of documents regarding actual capital expenditures in RFP 8," but that you would not agree "to provide documents pertaining to 'potential' capital expenditures," because you believe the request is overbroad and calls for speculation.

We cannot accept a limitation that excludes all documents pertaining to potential capital expenditures. Such a limitation would exclude Amtrak's consideration of capital investments that CN has specifically proposed for Amtrak services over CN's lines, and it would be inconsistent with Amtrak's own request to CN for documents relating to capital investments "considered to increase or decrease delays to passenger or freight trains." See Amtrak RFP 34. CN, however, would be willing to compromise by limiting the scope of Amtrak's response to RFP 8 consistent with the scope of CN's response to RFP 34, that is, to documents that "propose, analyze, approve, or disapprove" of potential capital investments.

Please let me know by April 7 if this is acceptable to Amtrak. If not, this may be the subject of a further motion to compel. In the mean time, unless Amtrak agrees to expand its response, it should expect CN to similarly limit its responses to Amtrak requests concerning capital investments.

**RFP 13:** Amtrak agreed in its discovery response to produce "organizational charts" in response to RFP 13, so this request was not the subject of our meet and confer exchange. In your March 6 email forwarding Amtrak's search terms you state that your custodial list "is responsive" to RFP 13. That list, however, is not an organizational chart and is not a substitute for an organizational chart as it fails to show the organizational structure of Amtrak's employees. Please provide Amtrak's organizational charts without further delay.

**RFP 14 and Interrogatory 20:** Your email states that Amtrak is still considering the issues relating to the scope of its response to RFP 14 and Interrogatory 20. Amtrak has had more than sufficient time – almost three months now – to consider these responses. Please let us know Amtrak's final position by April 7 so that we can promptly determine whether to file a motion to compel.

**RFP 18:** As discussed below with respect to Amtrak search term #1, we believe the search terms intended to identify information concerning the pricing of passenger tickets and the relationship between ticket prices and ridership are too narrow and should be expanded as indicated.

**RFP 20:** You state that you are still unclear as to what CN is seeking, but that you will “see what documents turn up.” As we previously clarified in my December 27, 2013 letter, we are seeking through RFP 20 documents relating to claims, analyses reviewed by Amtrak or submitted by Amtrak, or projections or quantifications of benefits to the public of Amtrak service, and also documents relating to any actual, projected, or claimed relationship between such public benefits and Amtrak’s on-time performance. Amtrak and others have made claims concerning the public benefits of its services (e.g., passenger time savings, environmental benefits, cost savings), as well as the relationship of Amtrak on-time performance to such benefits.

You say that you will “see what documents turn up,” but none of your searches appears calculated to find such documents. Accordingly, we suggest below an additional search term (#5) that should do so.

**Interrogatory 17:** The issues you raise with respect to this interrogatory appear to relate exclusively to Part (b), which asks for documents related to complaints, grievances, criticisms, assessments and alike of Amtrak’s “promulgation or implementation of policies, practices, or procedures for the monitoring, recording, coding, reporting, measurement, or description of delays to Amtrak trains.” Your response raises two essential issues, one with respect to “implementation,” and the other with respect to limiting your answer to CN-specific documents. I respond in order:

**(i) Implementation:** You claim – for the first time -- that Interrogatory 17’s request for production regarding criticisms and assessments of Amtrak’s “implementation” of policies, practices, and procedures is “overbroad,” and you offer to “discuss” any specific implementation documents CN seeks.

We believe this request is important and not overbroad. Much of what Amtrak has done regarding the areas covered by Part (b) of Interrogatory 17 falls into the category of implementation rather than promulgation. Implementation includes the ways in which Amtrak has in practice interpreted or applied its various policies, practices, or established procedures, as distinct from the initial process of developing and adopting them. In particular, the way in which Amtrak has implemented delay coding is of central relevance to this proceeding insofar as such delay coding may be proposed as a basis for an incentive or penalty provision. It is neither requisite nor practicable for CN to identify the specific responsive documents in Amtrak’s possession. As a guide, however, we are particularly interested in documents relating to criticisms and assessments of (i) the way Amtrak has interpreted and deployed its various delay codes, (ii) Amtrak’s internal processes for and inconsistencies in reviewing coding issues, and (iii) Amtrak decisions regarding reporting, publication, or correction of delay coding (e.g., imposing time limits on carriers seeking to identify coding errors).

With this further clarification, our hope is that Amtrak will withdraw any objection regarding the production of documents relating to criticisms or assessments of its “implementation” of its various policies. Please let us know by April 7 so that we may promptly determine whether to file a motion to compel.

**(ii) Limitation to “CN-Specific Documents”:** As CN made clear during our meet and confer and again through my letter of December 27, 2013, it is not reasonable for Amtrak to limit its response to Part (b) of Interrogatory 17 to “CN-specific documents.” All of Amtrak’s policies of general applicability to host carriers by definition apply to and are relevant to CN, but, because they are of general applicability, those policies will not necessarily refer specifically to CN. Thus, many of the documents covered by Part (b) of Interrogatory 17 are apt to be excluded by Amtrak’s limitation of its production to “CN-specific documents,” even though the policies, practices, and procedures at issue apply to CN.

In addition, Amtrak’s limitation would disable CN from understanding (i) issues that may not have directly affected CN to date but may affect CN in the future, (ii) how widespread issues and criticisms

have been with respect to Amtrak policies and procedures, and (iii) the extent to which Amtrak has or has not been consistent in developing and applying policies and procedures to various host railroads.

Amtrak's agreement to produce "relevant business records" that cover certain "policies, practices and procedures" is inadequate. It would seem to exclude most or all documents regarding implementation and, in fact, seems unlikely to add anything substantial to the set of CN-specific documents that Amtrak has already agreed to produce.

Please let me know by April 7 if you agree with respect to your response to Part (b) of Interrogatory 17 to remove your limitation to documents that specifically refer to CN, so that we may determine whether to file a motion to compel.

**Interrogatory 18:** As we've discussed, and consistent with the requirements of our Joint Discovery Protocol (see Section 3(e)(ii)), we need to meet and confer regarding databases. Your production of a copy of the Delay Data Recording Policy, however, need not and should not be deferred since it is a discrete policy relating to Amtrak's instructions to its conductors and not technical database issues. Please produce it ASAP.

We are amenable to discussing at our database meeting the other database-related answers that you told us in December you would provide, but, given the procedural schedule, such a meeting must take place promptly. I suggest later this week. Please let me know if that is acceptable and suggest dates and times.

**(B) As outlined below, Amtrak's search terms are deficient in important respects.**

#### **General comments**

(a) In accordance with our comments above, Amtrak's search terms are generally deficient in that they are designed to limit production to CN-specific materials, thereby excluding a wide range of relevant, discoverable material sought by CN. There are many ways in which Amtrak could modify or supplement its search terms to remedy this deficiency. Our comments on specific searches (and accompanying redline) below do not attempt to address that issue. Instead, they address other, more specific issues.

(b) In providing our comments, we assume that Amtrak intends to produce all non-privileged responsive documents with respect to certain requests through means other than use of search terms, as no search terms appear to apply to such requests (e.g., RFP 4 (number of trains on CN lines), RFP 13 (org charts), IR 4 (records mgmt and retention policies)). Please confirm that this is your intention, and identify the CN requests to which Amtrak intends to respond without relying on search terms.

#### **Searches #1, #2, and #3**

- "IC" and "ICRR" should be added before the AND connector as these are common abbreviations for Illinois Central Railroad; indeed, in our experience, more common abbreviations than "ICR"
- "CNRR" should similarly be added as another form of abbreviation for Canadian National Railway Company
- Wildcards (*i.e.*, \*) should be added after Illini and before Saluki (in order to pick up documents that contain the term "Illini/Saluki" or Illini-Saluki")
- Wildcards should be added before and after each train ID, (e.g., \*364\*) (in order to pick up documents that refer to the trains using CN's naming convention, which include P364 or P36491-05)

#### **Search #1**

- Common synonyms for "delay," such as late, held, hold, wait, meet, stop, or slow should be added to the parenthetical "(delay and freight)"

- The term “ridership” should be changed to “rider\*” in order to identify any documents that use the term rider(s)
- The word “ticket” should be struck from “ticket revenue” because “ticket revenue” would not find responsive documents that use terms such as “revenues from tickets or ticketing” or “fare box revenues” or “ridership revenues” etc.
- Common synonyms for coding (“classif\*” and “categor\*”) should replace “Cod\*” in the parenthetical (“Cod\* w/5 delay”) (“cod\*” is already separately covered by the search terms)
- The following common synonyms and acronyms should be added to the end of the existing search string in order to identify documents responsive to various CN requests: price\* OR pricing OR rate OR relief OR performance OR payment OR FTI OR (freight W/5 interfer\*) OR offset OR lookback OR look-back OR “look back” OR DAI OR dispatch\* OR priority OR preference

#### **Search #2**

- Common synonyms for infrastructure investment and funding terms, such as capex OR cap-ex OR facil\* OR plant OR invest\* should be added after the AND connector

#### **Search #3**

- “OR fund” should be added to the end of the search string

#### **Search #4**

- The term “207” should be moved to the left side of the AND connector
- The following string should be added before the AND connector in order to identify documents responsive to various CN document requests: “improvement act” OR ((15 OR fifteen) W/10 miles)
- The following string should be added after the AND connector in order to identify documents that may use common synonyms for other words used in this search string: standard\* OR measure OR criteri\* OR HRD OR delay OR cost\* OR burden\* OR interfer\*

#### **Suggested additional search term #5:**

We believe the following fifth search should be added in order to identify documents responsive to RFP 20 that are unlikely to be identified through the previous searches:

(Amtrak OR Amtk OR “National Railroad Passenger Corporation” OR NRPC OR “on time performance” OR “on-time performance” OR OTP OR late OR delay OR FTI OR interfer\*) AND (public w/5 benefit)

#### **Suggested additional search term #6:**

We believe the following sixth search should be added in order to identify responsive documents that are unlikely to be identified through the previous searches:

(polic\* or proced\* or practice\* or rule\*) AND CDR OR HRD OR OTP OR FTI OR (host w/3 responsib\*) OR “freight train interference” OR (on\*time w/3 perform\*)

As noted above, attached is a redline showing our specific suggestions to Amtrak’s search terms. Please let me know by April 7 whether Amtrak agrees to implement these important changes.

**(C) Minor revisions to CN's search terms**

In order to work properly with our consultant's review engine, we have determined that some minor changes are required to our initial list of search terms. Attached is a redline that shows those changes. In addition, the redline adds Czarny and Urena to search #5, a change I noted for you in my email of March 24, and adds them and Jim Vena to the custodian key.

Thanks,

David



Amtrak search terms - redline 3-31-14.docx

Final IC-GTW Search Terms (rev 03-31).docx

**[Attachments and prior email string omitted.]**

# Exhibit 5

From: "Morgan, Linda J." <lmorgan@nossaman.com>  
To: "dhirsh@harkinscunningham.com" <dhirsh@harkinscunningham.com>  
Date: Tue, Apr 8, 2014 11:10 PM  
Subject: Discovery Follow Up

David,

Following up on your March 31 email:

1. Amtrak Search Terms: Your suggested changes are under serious consideration, and I will have a revised draft to you as soon as possible. Regarding document production independent of search term searches, we will be providing documents in response to RFP 4 (number of trains), RFP 13 (organizational charts) and IR 4 (records management and retention policies). I will get back to you if we identify any additional responses in this category.
2. RFP 13: We will be producing the organizational charts that exist.
3. RFP 18 and 20: We are considering your requests in the context of the search term revisions.
4. Interrogatory 18: We will be producing Amtrak's Delay Data Recording Policy as a business record in accordance with our response. Regarding a meet and confer to discuss databases, perhaps we can talk by phone tomorrow afternoon or sometime Thursday.
5. Regarding RFP 7, 8-10, and 14 and Interrogatory 17 and 20, I am not in a position to agree to any change in Amtrak's responses at this time.

Linda

# Exhibit 6

## National Rail Passenger Corporation v CN – Search Terms

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Search Number/Type	Search String	Date Range	Custodians
1	(CN OR CNR OR CNRR OR “Canadian National”) AND Dubuque	5/1/2011 - 10/31/2013	ALL
2	(CN OR CNR OR CNRR OR “Canadian National” OR IC OR ICR OR ICRR OR “Illinois Central” OR GTW OR “Grand Trunk” OR “City of New Orleans” OR Illini OR Saluki OR “Texas Eagle” OR Lincoln OR “Blue Water” OR Wolverine OR ?364*?OR ?365* OR ?58* OR ?59* OR ?390* OR ?391* OR ?392* OR ?393* OR ?300* OR ?301* OR ?302* OR ?303* OR ?304* OR ?305* OR ?306* OR ?307* OR ?21* OR ?22* OR ?350* OR ?351* OR ?352* OR ?353* OR ?354* OR ?355*) AND (((Delay or late OR held OR hold OR wait OR meet OR stop OR slow) w/25 Freight)) OR ((Classif* OR Cod*OR categor*) w/5 delay) OR HRD OR OTP OR “on time performance” OR “on-time performance” OR CDR OR relief OR FTI OR (freight W/5 interfer*) OR dispatch* OR priority OR preference)	5/1/2011 - 10/31/2013	ALL
3	(CN OR CNR OR CNRR OR “Canadian National” OR IC OR ICR OR ICRR OR “Illinois Central” OR GTW OR “Grand Trunk” OR “City of New Orleans” OR Illini OR Saluki OR “Texas Eagle” OR Lincoln OR “Blue Water” OR Wolverine OR ?364*?OR ?365* OR ?58* OR ?59* OR ?390* OR ?391* OR ?392* OR ?393* OR ?300* OR ?301* OR ?302* OR ?303* OR ?304* OR ?305* OR ?306* OR ?307* OR ?21* OR ?22* OR ?350* OR ?351* OR ?352* OR ?353* OR ?354* OR ?355*) AND (Cost OR Compensat* OR Increm* OR incent* OR penalt* OR (App* w/10 (IV or V or VI)) OR relief OR payment OR offset OR lookback OR “look back” OR look-back OR DAI)	5/1/2011 - 10/31/2013	ALL

4	(CN OR CNR OR CNRR OR "Canadian National" OR IC OR ICR OR ICRR OR "Illinois Central" OR GTW OR "Grand Trunk" OR "City of New Orleans" OR Illini OR Saluki OR "Texas Eagle" OR Lincoln OR "Blue Water" OR Wolverine OR ?364*?OR ?365* OR ?58* OR ?59* OR ?390* OR ?391* OR ?392* OR ?393* OR ?300* OR ?301* OR ?302* OR ?303* OR ?304* OR ?305* OR ?306* OR ?307* OR ?21* OR ?22* OR ?350* OR ?351* OR ?352* OR ?353* OR ?354* OR ?355*) AND (Passenger OR Rider* OR (ticket W/10 revenue) OR (fare w/10 revenue) OR (ridership w/10 revenue))	5/1/2011 - 10/31/2013	ALL
5	(CN OR CNR OR CNRR OR "Canadian National" OR IC OR ICR OR ICRR OR "Illinois Central" OR GTW OR "Grand Trunk" OR "City of New Orleans" OR Illini OR Saluki OR "Texas Eagle" OR Lincoln OR "Blue Water" OR Wolverine OR ?364*?OR ?365* OR ?58* OR ?59* OR ?390* OR ?391* OR ?392* OR ?393* OR ?300* OR ?301* OR ?302* OR ?303* OR ?304* OR ?305* OR ?306* OR ?307* OR ?21* OR ?22* OR ?350* OR ?351* OR ?352* OR ?353* OR ?354* OR ?355*)AND (Capital OR Improv* OR Infrastructure OR Capacity OR Fund* OR capex OR "cap-ex" OR facil* OR plant OR invest*)	1/1/2008-10/31/2013	ALL
6	(CN OR CNR OR CNRR OR "Canadian National" OR IC OR ICR OR ICRR OR "Illinois Central" OR GTW OR "Grand Trunk" OR "City of New Orleans" OR Illini OR Saluki OR "Texas Eagle" OR Lincoln OR "Blue Water" OR Wolverine OR ?364*?OR ?365* OR ?58* OR ?59* OR ?390* OR ?391* OR ?392* OR ?393* OR ?300* OR ?301* OR ?302* OR ?303* OR ?304* OR ?305* OR ?306* OR ?307* OR ?21* OR ?22* OR ?350* OR ?351* OR ?352* OR ?353* OR ?354* OR ?355*)AND (appropriat* OR (FRA w/25 grant*) OR subsid* OR fund*)	1/1/2008 - 10/31/2013	ALL
7	((PRIIA OR "improvement act" w/10 207) OR METRIC) AND (((15 OR fifteen) W/10 miles)) OR cost* OR burden*OR accur* OR reliab*OR significan* OR defin*)	1/1/2008-10/31/2013	ALL
8	(Amtrak OR Amtk OR "National Railroad Passenger Corporation" OR NRPC OR "on time performance" OR "on-time performance" OR OTP OR late OR delay OR FTI OR (freight W/5 interfer*) OR interf*) AND (public w/5 benefit)	1/1/2008-10/31/2013	ALL